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2984

No. 15271

In the

**United States Court of Appeals
For the Ninth Circuit**

see vol. 2983
OREGON PLYWOOD SALES CORPORATION,
Appellant,
v.

SUTHERLIN PLYWOOD CORPORATION and NORDIC
PLYWOOD, INC., *Appellees.*

BRIEF OF APPELLANT

Appeal from the United States District Court for
the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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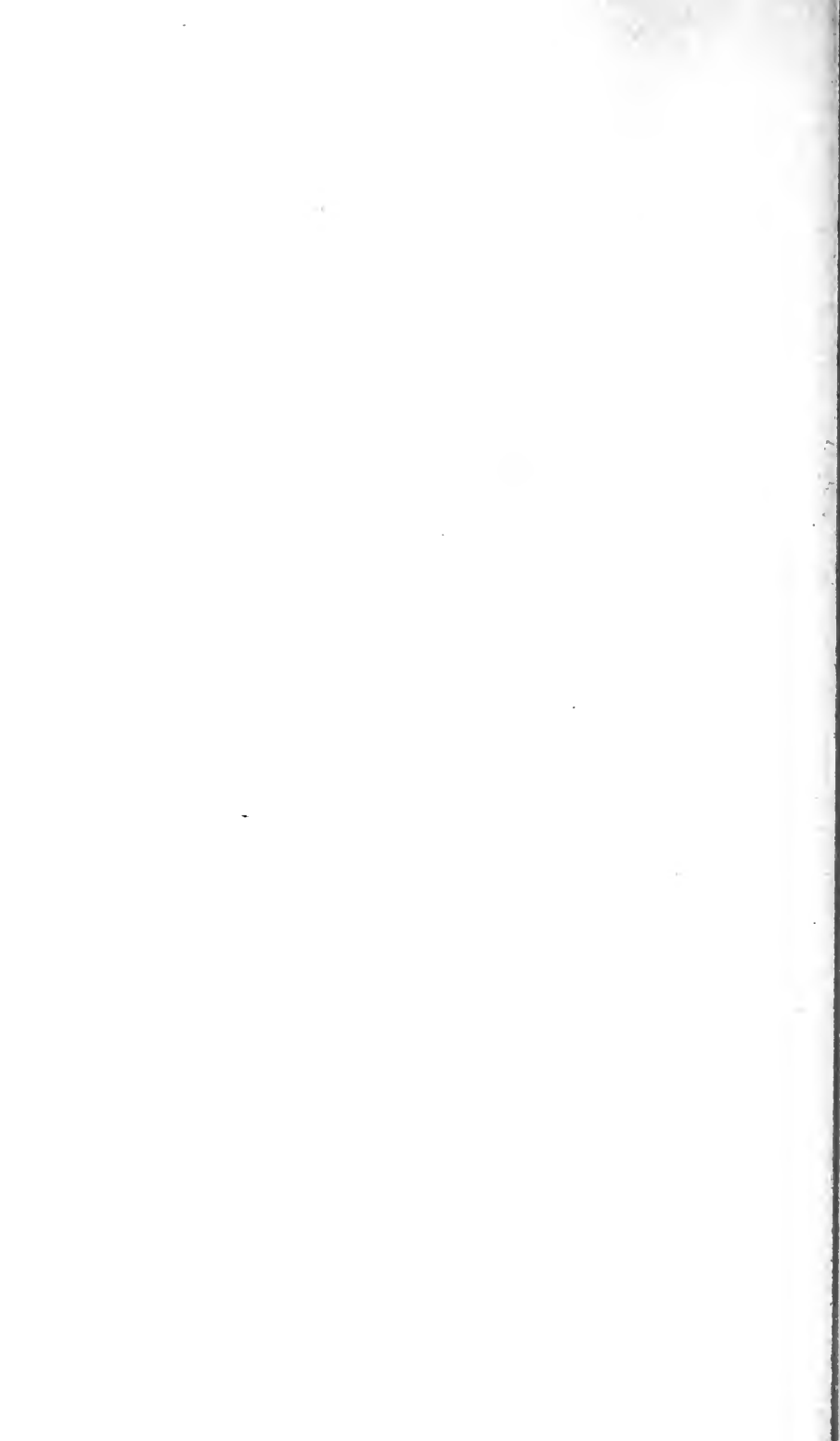
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No. 15271

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For the Ninth Circuit

OREGON PLYWOOD SALES CORPORATION, *Appellant*,

v.

SUTHERLIN PLYWOOD CORPORATION and NORDIC PLYWOOD, INC., *Appellees*.

BRIEF OF APPELLANT

Appeal from the United States District Court for
the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

JURISDICTION

This action was commenced in the United States District Court for the District of Oregon by appellant Oregon Plywood Sales Corporation, a New York Corporation, against appellee Sutherlin Plywood Corporation, an Oregon corporation, and appellee Nordic Plywood, Inc., an Oregon corporation. The amount in controversy, exclusive of interest and costs, exceeds \$3,000.00. (Tr. 4, 25).

Appellant has appealed from the final judgment and decree of said court (Tr. 67-68).

The District Court acquired jurisdiction under 62 Stat. 930, USC 1332. This court acquired jurisdiction under 62 Stat. 929, 28 USC 1291.

STATEMENT OF THE CASE

For convenience appellee Sutherlin Plywood Corporation will be referred to as Sutherlin and appellee Nordic Plywood Inc. will be referred to as Nordic.

Sutherlin was incorporated in November, 1951, for the purpose of operating a "plywood lay-up mill," i.e. a mill which purchases green veneer and processes it into plywood by drying, gluing, sanding, etc. (Tr. 25).

By November 1953 Sutherlin's mill was completed and it was ready to operate. But Sutherlin needed working capital to buy veneer and to meet payrolls (Tr. 116, 72).

Appellant agreed to arrange a loan to Sutherlin of \$80,000.00 for working capital, to advance the cost of purchases of veneer for Sutherlin, to use its best efforts to maintain with Sutherlin a 30 day order file for its product and to advance 80% of the mill value of the products upon receipt of invoices, that is, to provide accounts receivable financing. In return Sutherlin

agreed to give appellant the right to purchase 80% of its output (Ex. 1, 2).

Paragraph one of the contract (Ex. 1) grants to appellant “the right to purchase up to 80% of the output” of Sutherlin. In that paragraph Sutherlin also “agrees to accept up to 80% and ship appellant’s orders as specified and within a reasonable time.”

Sutherlin expressly agreed that “this sales contract shall be in full force and effect from the beginning of production * * * and continue for at least 50 months.” (Ex. 1).

We contend that the above provisions of the contract together with the contract as a whole and the burdens assumed by appellant indicate that continuous operation by Sutherlin for the term of the contract was intended and expressly promised.

Disregarding the express provisions of the contract and its clear intent, Sutherlin ceased operation April 21, 1954. On September 7, 1954, Sutherlin disabled itself from continuing its business and from carrying out the terms of the contract by selling its mill to Nordic. Since that date Nordic has continuously operated the mill. (Finding XXVIII, Tr. 61).

Sutherlin contends that financial difficulties excused it from performing its contractual obligations. The court

agreed that financial difficulties were an excuse for performance of contractual duties. At p. 254 of the transcript the following appears:

“Mr. Anderson: Is your Honor holding that financial difficulties are an excuse for performance?

The Court: Yes, I am holding precisely that.”

But Sutherlin did not have any serious financial difficulties. Its liabilities were \$213,270.10 (Ex. 5, 131). Nordic successfully operated the mill commencing in September, 1954 with liabilities of \$679,319.19! (Ex. 6, 133). Nordic did not have the financial advantages which Sutherlin had, such as financing of its veneer purchases (the major part of the expense) and accounts receivable financing by appellant, both without charge to Sutherlin.

Appellant did these things for Sutherlin:

1. Loaned Sutherlin \$80,000.00 (Tr. 125).
2. Purchased veneer for Sutherlin at a cost of \$214,-346.87 (Ex. 24, Finding XXIX).
3. Supplied Sutherlin with orders for its production (Tr. 85).
4. Advanced 80% of the mill value of Sutherlin's production upon the receipt of invoices (Tr. 85, 119).

In return Sutherlin was obligated to grant appellant the right to purchase 80% of its output and to accept and ship appellant's orders for the term of the contract.

The written agreements are contained in two documents. Exhibit 1 is the sales contract whereby Sutherlin agreed to grant appellant the right to purchase up to 80% of its output, to accept and ship appellant's orders and to continue the contract in full force and effect for at least 50 months. Appellant agreed in that document to use its best efforts to maintain with Sutherlin a 30 day order file and to finance its accounts receivable.

Exhibit 2 was executed by appellant's parent corporation, Oregon Plywood Corporation, which agreed to loan Sutherlin \$80,000.00 and to buy the veneer required for Sutherlin's operation.

Sutherlin commenced production in January 1954 (Tr. 54). Although appellant continued to furnish orders to Sutherlin, continued to purchase veneer for Sutherlin and continued to advance 80% of the mill value of Sutherlin's product, Sutherlin disregarded its contract, ceased production on April 21, 1954, and sold its mill to Nordic on September 7, 1954.

Nordic was aware of Sutherlin's contract with appellant before the sale (Tr. 27). Nordic knew that the sale of the mill would disable Sutherlin from perform-

ance of its contract with appellant (Finding XXV, Tr. 60, 133, 135) and Nordic did not intend to furnish the product of the mill to appellant (Tr. 28). By cosummat-ing the purchase of the Sutherlin mill in September, 1954, Nordic thereby interfered with appellant's con-tract rights and is responsible for damage resulting to appellant.

Sutherlin's breach of the sales contract resulted in damages to appellant of \$72,000.00 up to the date of the trial on March 27, 1956. Nordic's interference with appellant's contract rights prevented performance of said contract and caused the same damages. Sutherlin's failure to continue in operation damaged appellant in an additional amount of \$20,000.00 which occurred prior to the time it was disabled from further perform-ance by the sale.

Appellant brought this action to recover from Suth-erlin for breach of contract and to recover from Nordic in tort for interfering with its contractual rights and to enjoin Nordic from further destruction of appellant's contract rights. The trial court held that Sutherlin was excused from performance of its contract because it had financial difficulties and that Nordic had not interfered with appellant's contract rights. It entered judgment accordingly. From that judgment appellant has ap-pealed to this court.

Appellant recovered judgment against Sutherlin in the amount of \$3,924.78 on various open account items and no appeal has been taken from that portion of the judgment by any party.

QUESTIONS PRESENTED

1. Did Sutherlin breach its contract by discontinuing operation in April, 1954, and by selling its mill to Nordic in September, 1954, thereby disabling itself from performance of its contract with appellant?

2. Did Nordic interfere with appellant's contract rights by purchasing Sutherlin's mill with the knowledge that Sutherlin would thereby be disabled from performing its contract with appellant?

3. For what amounts are Sutherlin and Nordic liable to appellant?

4. Should further destruction of appellant's contract rights be prevented by enjoining Nordic from selling the product of the Sutherlin mill unless appellant's right to purchase 80% of the product is honored?

SPECIFICATION OF ERRORS

I

The trial court erred in entering Finding VIII (Tr. 53) that:

1. Appellant "knew that the condition of the market was not favorable to the prospects of successful operation of a newly organized plywood company organized as was defendant Sutherlin Plywood Corporation." There is no evidence of such knowledge and the only reasonable inference to be drawn from the fact that appellant agreed to loan \$80,000.00 to Sutherlin, agreed to finance Sutherlin's veneer purchases without charge in an expected amount of \$75,000.00 per month and agreed to advance 80% of the mill value of Sutherlin's product on receipt of invoices is that appellant believed prospects were favorable for Sutherlin's successful operation.

2. Appellant knew Sutherlin "was weak financially and was in dire need of working capital" when the contract (Ex. 1) was executed on December 17, 1953. This finding is not material and it is contrary to the evidence. The evidence is that on December 31, 1953, Sutherlin had a net worth of \$482,820.65, long term debt of only \$28,253.95 on purchase contracts and \$39,000.00 on its mortgage to appellant as shown on its balance sheet (Ex. 5). Even by including one year's payments on its long term debt in its current liabilities it had sufficient current assets to meet them. Its current assets were \$95,269.48 and its current liabilities (including installments due for one year) were only \$95,870.38. This statement does not include another \$30,000.00 which

appellant had agreed to loan. Admittedly, Sutherlin needed working capital before it met appellant, but appellant's agreement to loan \$80,000.00 supplied the working capital.

3. Appellant "knew of and appreciated the risks that Sutherlin might not be able to operate profitably and might be compelled to shut down" and knew that Sutherlin "might not be able to keep the mill in operating condition." There is no evidence that Sutherlin was compelled to shut down or that it was unable to keep the mill in operating condition. The evidence is to the contrary. But in any event there is no evidence that appellant knew of or considered those matters.

II

The court erred in entering Finding XIII (Tr. 56) that Sutherlin at the time it ceased operations and since "has been unable to pay its obligations as they matured." This finding is not supported by the evidence. It is not within the issues in this case in any event. It does not indicate that Sutherlin was unable to operate in the unprecedented seller's market which existed from the summer of 1954 to the time of trial.

III

The court erred in entering Finding XIV (Tr. 56) to the effect that when Sutherlin ceased operating its work-

ing capital was completely depleted and it was unable to pay certain expenses. This finding is unsupported by the evidence. It is not within the issues. Financial difficulty is not an excuse for performance. Sutherlin's financial difficulty did not, in fact, prevent performance. Nordic's successful operation of the same mill with even less capital proves that Sutherlin would have been able to continue in operation if it had tried.

IV

The court erred in entering Finding XV to the effect that "Sutherlin diligently and persistently sought additional financing." There is no evidence to support this finding. The evidence is only that there was an attempt to borrow money from the local bank and from the U. S. National Bank in Roseburg after the plant was shut down (Tr. 192). There is no evidence of any effort to obtain financing after the decision was made in June to sell the mill (Tr. 57). Finding XVI correctly states that "from that time forward it actively sought to find a possible buyer or lessee thereof and invited offers therefor." (Tr. 57). There is no evidence that any efforts were made to obtain financing after the market improved in June, 1954.

V

The court erred in entering Finding XXIII (Tr. 59) that at the time Sutherlin ceased operations and at the

time of the sale Sutherlin had “become disabled through no fault of its own from furnishing plaintiff with any output of said mill or honoring plaintiff’s orders for plywood.” There is no evidence that Sutherlin ever tried to operate after the market improved in June, 1954, or that it was disabled from performing.

VI

The court erred in entering Finding XXII (Tr. 59) that Sutherlin acted in good faith and in the exercise of reasonable business judgment in selling its mill and that it had no alternative but to sell or face continued losses and ultimately bankruptcy. There is no evidence that Sutherlin displayed any good faith by attempting to operate and comply with its contract with appellant after the tremendous market improvement occasioned by the strike in the industry in June, 1954. There is absolutely no evidence that Sutherlin would have had continued losses or ultimately bankruptcy if it had operated. The evidence shows that the same mill was successfully and profitably operated by Nordic without the advantages which Sutherlin had i.e. financing of veneer purchases and advances on accounts receivable. Sutherlin simply chose to disable itself from further performance by selling its mill rather than continuing operation as Nordic proved was feasible and profitable.

VII

The court erred in entering Finding XXVI (Tr. 60) that Nordic did not induce Sutherlin to sell said mill and in failing to find that Nordic interfered with appellant's contract rights by participating in the act which disabled Sutherlin from performing its contract with appellant. The undisputed evidence is that Nordic knew that after its purchase of the mill Sutherlin would be unable to furnish plywood to appellant (Tr. 60) and that such purchase would make it impossible for Sutherlin to perform its contract with appellant (Tr. 135).

VIII

The court erred in entering Finding XXVII (Tr. 60) that there was no collusion between Sutherlin and Nordic to destroy appellant's rights in its contract with Sutherlin and that Nordic had no intent to damage appellant or destroy its rights in said contract. There is no evidence to support this finding. The evidence is that the officers of Nordic knew its purchase of the Sutherlin mill would destroy appellant's rights in said contract (Tr. 132, 135), but they nevertheless participated in the sale which disabled Sutherlin from carrying out its contract.

IX

The court erred in entering Conclusion of Law II (Tr. 63) that Sutherlin did not agree to continue pro-

duction for any period of time and in the event conditions made it unprofitable it was to be relieved from continuing production. The contract expressly stated that it was to be in full force and effect for 50 months with an extension of three months for each \$3,000.00 advanced over the original loan of \$50,000.00. Since \$30,000.00 additional was advanced, the contract was by its express language to continue for 60 months. The contract itself, the burdens imposed upon appellant and every reasonable intendment of the evidence show that it was intended by the parties that Sutherlin would continue in operation for the term of the contract.

X

The court erred in entering Conclusion of Law III (Tr. 64) that the contract did not divest Sutherlin of the right to dispose of its physical assets. The contract is not open to such a construction. By express provision of the contract Sutherlin agreed to continue in force its promise to provide appellant with 80% of its output for 60 months. Under the contract Sutherlin did not have the right to disable itself from performance by selling its mill thereby rendering performance impossible.

XI

The court erred in entering Conclusion of Law IV (Tr. 64) that appellant failed to prove that Sutherlin

guaranteed, promised or represented to appellant that it would continue in operation for at least 50 months. The contract by its express terms bound Sutherlin to continue the contract in force for at least 50 months.

XII

The court erred in entering Conclusion of Law V (Tr. 64) that appellant failed to prove that Sutherlin acted in bad faith in ceasing operations or selling its mill. The officers of Sutherlin admitted that they knew that the sale of the mill would disable Sutherlin from performance of its contract with appellant. There is no evidence that Sutherlin tried to operate after it shut down on April 21, 1954 and after June, 1954 it exerted all its efforts to sell the mill and destroy the subject matter of the contract thereby making performance impossible.

XIII

The court erred in entering Conclusion of Law VI (Tr. 64) that Sutherlin did not breach the contract with appellant by terminating production or by selling its physical assets to Nordic or by failing to furnish appellant 80% of the output of the mill after Nordic commenced operating. The contract provided that it would remain in full force and effect for at least 50 months and the only reasonable construction of the contract is that the parties intended that Sutherlin would continue op-

eration for at least 50 months. By failing to do so, Sutherlin did breach its contract with appellant.

XIV

The court erred in entering Conclusion of Law VII (Tr. 65) that Sutherlin was excused from furnishing appellant with further production and from honoring further orders of appellant by reason of its financial losses, insolvency and inability to produce further. Financial losses have never before been held to be an excuse for performance of a contract. There is no evidence that Sutherlin was insolvent and Exhibits 5 and 131 show that Sutherlin was not and is not insolvent. Its assets have at all times exceeded its liabilities. It has at all times had a substantial net worth and still has a net worth of approximately \$375,000.00. There is no evidence that Sutherlin was unable to produce further and the fact that Nordic was able to produce in the same mill under less favorable conditions indicates that Sutherlin could likewise have produced. Neither insolvency nor inability to perform are an excuse for breach of contract, particularly where inability to perform is occasioned by the promissor voluntarily disabling itself from performance.

XV

The court erred in entering Conclusion of Law VIII (Tr. 65) that appellant failed to prove that Nordic inter-

ferred with said contract, induced a breach thereof or conspired with Sutherlin to destroy appellant's rights in such contract. Admittedly, Nordic knew of Sutherlin's contract with appellant and knew that its purchase of Sutherlin's mill would disable Sutherlin from performing its contract with appellant. By purchasing Sutherlin's mill Nordic interfered with appellant's contract rights and participated in and induced the breach by Sutherlin.

XVI

The court erred in entering Conclusion of Law IX (Tr. 65) that Nordic "did not unlawfully interfere with said agreements or induce a breach thereof or conspire with defendant Sutherlin Plywood Corporation to destroy plaintiff's rights therein and was not bound by them. It was privileged to purchase the physical assets of defendant Sutherlin Plywood Corporation." The evidence shows that Nordic did unlawfully interfere with said contract, induced the breach thereof and conspired with Sutherlin to destroy appellant's rights in said contract by entering into an agreement with Sutherlin to purchase Sutherlin's mill with the knowledge that said purchase would destroy the subject matter of appellant's contract and render performance by Sutherlin impossible. There is no contention that Nordic was a party to the contract between Sutherlin and appellant and

the claim against ~~Sutherlin~~ ^{Nordic} is that it is liable in tort to appellant. The conclusion that Nordic was not bound by said contract is not within the issues of this case. There is no law which grants Nordic any privilege to interfere with appellant's contract rights.

XVII

The court erred in entering Conclusion of Law XI (Tr. 66) that appellant is entitled to no affirmative relief or damages against Sutherlin for breach of said contract. The evidence is that Sutherlin did breach said contract and should be required to respond in damages.

XVIII

The court erred in entering Conclusion of Law XII (Tr. 66) that appellant is entitled to no affirmative relief or damages against Nordic. The evidence shows that Nordic interfered with appellant's contract rights and it should be compelled to respond in damages.

XIX

The court erred in entering Conclusion of Law XV (Tr. 66) that plaintiff is not entitled to judgment against Sutherlin and Nordic and for the costs and disbursements herein incurred. The evidence and applicable law shows that appellant is entitled to judgment against Sutherlin and Nordic for damages and for the costs and disbursements herein incurred.

The court erred in failing to find and conclude:

1. That Sutherlin breached its contract by discontinuing operation in April, 1954 and by selling its mill to Nordic in September, 1954 thereby disabling itself from performance of its contract with appellant.

2. That Nordic interfered with appellant's contract rights and induced a breach of appellant's contract by purchasing Sutherlin's mill thereby disabling Sutherlin from performing its contract with appellant.

3. That appellant is entitled to recover damages of \$72,000.00 from Sutherlin and Nordic and an additional \$20,000.00 from Sutherlin.

4. That Nordic should be enjoined from selling the product of the mill to anyone other than appellant pursuant to the terms of its contract.

And the court erred in failing to enter judgment in accordance with the above.

ARGUMENT

I

The trial court erred in failing to find and conclude that Sutherlin breached its contract with appellant by failing to continue in production after April 21, 1954, and by selling its mill to Nordic on September 7, 1954.

SUMMARY

A. The contract expressly requires Sutherlin to continue to operate for at least 50 months.

B. Even if it did not expressly require Sutherlin to continue in production for at least 50 months, the contract should be construed as implying that continuous operation for the term of the contract is required.

C. The grounds on which the trial court absolved Sutherlin of liability are erroneous and the record contains no other basis which will support the trial court's conclusion.

D. There is no proof that Sutherlin was insolvent, but neither insolvency nor financial difficulties excuse performance or justify the conclusion that a contract can not be performed.

A. The contract as a whole clearly shows that Sutherlin was obligated to continue its operation for the time of the contract.

The most important provisions on the issue of continuous operations are paragraphs three and four on page three of the contract. These paragraphs are as follows:

“This sales contract shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50 months, but this agree-

ment shall be extended one month for each \$3,000.00 advanced over said \$50,000.00 but under no circumstances shall expire until the mortgage by Party of the First Part to Oregon Plywood Corporation shall be paid in full.

IT IS UNDERSTOOD AND AGREED that if the Party of the First Part is unable to produce because of fire, earthquake, disaster or act of God, this contract shall continue in full force until the mortgage heretofore mentioned is paid in full."

The fourth paragraph is very significant for when read with the third it denies to Sutherlin certain excuses for nonperformance which otherwise might have been operative. It holds Sutherlin to a standard of performance for at least 50 months even though Sutherlin is temporarily unable to operate because of fire, earthquake, disaster or act of God unless Sutherlin pays its mortgage to us in full. We shall demonstrate this by showing the application of these two paragraphs in situations where they were intended to operate are repugnant to the notion that Sutherlin promised only to continue in production if in good faith it could produce; see *Great Lakes & St. Lawrence Transportation Co. vs. Scranton Coal Co.*, 239 Fed 603, 607.

Let us consider the application of these two paragraphs in a situation where Sutherlin could not produce

because of fire damage to its mill. Let us also assume that the inability to produce would be only temporary and that production would soon be forthcoming upon repair of the fire damage. Such a situation falls within paragraph four and in such a case that paragraph provides that the contract will remain in full force. Consequently, the contract by its terms would remain in full force even though production had been stopped temporarily because of fire. In other words, temporary inability to produce was not to relieve Sutherlin from the duty to continue in operation. If temporary inability to produce was not to relieve Sutherlin from continuing production, *a fortiori* it was not to be excused where fire, earthquake, etc. had not prevented production.

Other provisions of the contract clearly indicate that Sutherlin was to remain in continuous production during the term of the contract. The fourth paragraph on page two provides for deferment of payments on Sutherlin's mortgage in the event Sutherlin does not operate because we do not furnish sufficient orders to enable Sutherlin to dispose of 80% of its production. It provides that mortgage payments are to resume when we furnish orders sufficient to enable Sutherlin to operate continuously for a period of two weeks. This provision shows that the parties intended that Sutherlin was to be excused from continuous operation if appellant failed to

furnish orders, but continuous operation was to resume when appellant furnished orders for two weeks production. It is implicit in that provision that the mill was to resume continuous operation as soon as appellant furnished the orders for two weeks' production.

Paragraph three on page two requires appellant to maintain a 30 day order file at the mill. Surely the parties did not intend that Sutherlin was free to disregard these orders. They expressly covenanted that this contract "shall be in full force and effect from the beginning of production" by Sutherlin "and continue for at least 50 months." And in paragraph one on page one Sutherlin agrees to accept . . . and ship" appellant's orders "as specified and within a reasonable time." The only reasonable interpretation of these provisions is that Sutherlin would accept and ship appellant's orders for the term of the contract. It is clear that it was intended by the parties that Sutherlin would continue in operation for the term of the contract.

Only one more provision in the contract need be considered on the requirement that Sutherlin continue in operation for the term of the contract. That is the last paragraph on page two. It reads:

"Party of the First Part shall have the right to reject any orders placed with it by Party of the Second Part, provided specifications are not up to production condi-

tions, nor if unprofitable. All orders shall be deemed accepted unless same shall have been rejected and notices of rejection received by Party of the Second Part within forty-eight (48) hours from receipt of order by Party of the First Part."

It seems that the word "or" should have been used instead of the word "nor." The word "unprofitable" refers to orders with specifications which would make the particular order unprofitable. The word unprofitable is restricted in meaning by the context in which it appears and refers to unprofitability resulting from specifications not being up to production conditions. The reference to specifications not being up to production conditions refers to a situation where the specifications of the orders submitted are not of the kind which the equipment in Sutherlin's mill was designed to cope with as was the case with one of our orders for oiled and edge-sealed plywood (Tr. 155). Interpreting the word "unprofitable" in context it refers to particular orders which would be unprofitable because they were not of the kind which the mill could produce without changes in production conditions.

There are three reasons why we believe this interpretation of that paragraph is correct and what the parties intended. First, it is not reasonable to assume that the parties intended to undo the implications of the

other provisions of the contract which require continuous production. Second, if the parties had intended that Sutherlin was not required to operate in any instance where operation would be unprofitable, the parties would not also have provided that orders need not be filled when their specifications were not up to production conditions. The mere reference to unprofitability would have been sufficient. The third reason is that except for a single short utterance by defendants' counsel during the trial the defendants did not even mention this sentence during the trial let alone rely on it in defending this action. The instance to which we refer appears on page ninety-four (94) of the transcript:

“Mr. Yerke: But you are going also to have to establish, Mr. Anderson, in view of the provisions of your contract that the orders would also have been profitable to Sutherlin Plywood Corporation because Sutherlin under the provisions of your contract had the right to refuse any orders which were unprofitable.

Mr. Anderson: Well, that point—.

The Court: I am going to let the evidence in.”

The trial moved on before we could offer our interpretation of this sentence. This is the only instance where this provision in the contract was mentioned either by counsel for appellees or by appellees' witnesses.

If appellees really believed that this provision was intended to excuse production where it was unprofitable generally, surely their officers who testified below displayed an extraordinary capacity for self-control in constraining within themselves this bit of information which should have burst from their lips in righteous indignation.

The terms of the loan as shown in Exhibit 2 correspond with the term of the output contract and support our contention that the parties intended Sutherlin to operate for the full term of the contract. Exhibit 2 provides that the initial loan of \$50,000.00 was to be repaid by Sutherlin at the rate of \$1,000.00 per month. This would require 50 months for repayment—exactly the same term as the sales contract. In an identical factual situation the Court of appeals for the Third Circuit held that this fact indicated that it was intended or implied that operations would continue for five years.

In *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F2d 117 (CCA-3 1929) plaintiff agreed to loan defendant \$100,000.00 to construct a new plant. Defendant agreed to purchase its requirements of soda ash, caustic soda and bicarbonate of soda from plaintiff, “which agreement shall continue for a period of five years.” Defendant sold its business and failed to have any further requirements. In deciding “whether or not under the

terms of this contract there was an obligation on the part of the defendant to continue in business for five years and buy its supplies from the plaintiff during this time” the court said:

“The \$100,000 to be loaned to the defendant by the plaintiff was to be used by the defendant in the erection of a plant at Fairport. The notes were to be paid each six months after the other. There were ten of these notes, and that last was payable five years after the date thereof. This fact seems to indicate it was anticipated, intended, or implied that the operating contract between them was to continue for at least five years during which these notes were running and being paid off.”

Summarizing, Sutherlin promised to continue in production for at least 50 months. Sutherlin promised that it would “accept . . . and ship” appellant’s orders “as specified and within a reasonable time” and that “this contract shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50 months.” This alone requires Sutherlin to continue in production for 50 months, but construed in the light of the other provisions of the contract, no other construction is reasonable.

B. We do not for a minute suggest that this case turns on the rule which would apply here if the contract were silent on Sutherlin’s obligation to operate and have

an output. The following discussion is offered only to show the fallacy of argument which appellees may make. We submit that the contract here expressly requires Sutherlin to continue in operation and to have an output. Consequently, the rules presently to be discussed do not apply to this case. This court need not consider the problems raised by the authorities cited if it decides, as we think it must, that the contract requires Sutherlin to continue in operation for the term of the contract.

Where an output contract is silent on the question of whether continuous operations are required, the cases reveal four patterns of interpretation. In this discussion we will use cases involving requirements contracts, the converse of an output contract, interchangeably with cases involving output contracts, as Williston does, to illustrate the nature of the obligations which either type imposes.

The four patterns of cases are found in 1 Williston on Contracts (2 Ed.) 355-59. In the first pattern the buyer bargains only for a monopoly of the seller's output if there is one. Consequently, the seller in accordance with the understanding between him and the promisee is free to produce or not, as he sees fit. The following cases come within this category:

Imperial Refining Co. v. Kanotex Refining Co., 29
F 2d 193

Ramey Lumber Co. v. John Schroeder Lumber Co.,
237 Fed 39

Texas Co. v. Pensacola Maritime Corporation, 279
Fed 19

Mason-Walsh-Atkinson-Kier Co. v. Stubblefield, 99
F 2d 735

Petroleum Refractionating Co. v. Kendrick Oil Co.,
65 F 2d 997

*H. M. Pfann & Co. v. J. C. Turner Cypress Lumber
Co.*, 194 Fed 69

Drake v. Vorse, 52 Ia 417, 3NW 465.

In the second pattern the meaning given to the output promise is that the seller is required to act in good faith with respect to his output and to sell it to the buyer if he has one. Thus, it will be seen that something more is required here than is required in the first pattern. Good faith would presumably prevent the seller from choosing to cease production without reason or justification. The following cases fall within this classification:

In re United Cigar Stores Co., 8 Fed Supp. 243

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corporation, 130 F 2d 471

McKeever, Cook & Co. v. Canonsburg Iron Co., 138
Pa. 184, 16 A 97, 20 A 938

Willapa Electric Co. v. S. L. Dennis Construction Co.,
168 Wash 416, 12 P 2d 609

Helena Light & Railway Co. v. Northern Pacific Railway Co., 57 Mont 93, 186 Pac 702.

In the third pattern, the meaning given to the output promise is that the promisor undertakes to produce and sell his normal output. The following cases are of this type:

Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed 298

Robertson v. Miller, 286 Fed 503

Minnesota Lumber Co. v. Whitebreast Lumber Co.,
160 Ill 85, 43 NE 774

Wells v. Alexander, 130 NY 642, 29 NE 142

Hickey v. O'Brien, 123 Mich 611, 82 NW 241.

The second and third patterns involve what the courts sometimes refer to as “ordinary” cases, that is, situations where the only substantial commitments of both parties are the mutual promises to buy and sell. Cases in the second and third patterns which the courts do not expressly refer to as ordinary are, upon examination, nevertheless seen to be ordinary.

In the fourth pattern, the Courts interpret the output promise to require continuous production because the otherwise disproportionate burdens of the contract upon the buyer, such as where he has advanced large loans, constructed expensive buildings or forgone other substantial marketing opportunities, indicate that the parties as reasonable men intended continuous production.

A study of these four patterns indicates that there is only one dichotomy in this whole area of case law, an area in which litigation has been very intensive. That is found in the second and third patterns. In the second pattern where there is silence as to continuous operations, good faith is the only measure of the output seller's obligation. However, in the third pattern, normal output is required. (In the first pattern the output promisee is interested only in a monopoly of the seller's product. *Ramey Lumber Co. v. John Schroeder Lumber Co.*, 237 Fed 39 is a case of this type.)

Cases in the second and third patterns are ordinary cases, but in the fourth pattern the substantial commitments of the buyer take the case out of the ordinary category as in *Diamond Alkali Co. v. P. C. Tomson Co.*, 35 F 2d 117 where the promisee loaned the output seller \$100,000.00 in addition to the usual consideration, and *Texas Industries v. Brown*, 218 F 2d 510 where the promisee constructed a large and expensive plant in contemplation of fulfilling his obligations under the contract.

A leading case involving the ordinary situation is *In Re United Cigar Stores Co.*, 8 Fed Supp 243. Dealing with the obligation of a requirements buyer, the Court said that "A provision that he shall continue to have requirements is not ordinarily implied." 8 Fed Supp 243, 245. But note that the case was an ordinary one; the

only substantial commitments of the parties were their mutual promises to buy and sell.

The present case falls within the fourth pattern. In addition to purchasing the output, appellant was committed to make advances for the purchase of veneer (these amounted to \$214,346.87 in three months, Tr. 62), to loan Sutherlin \$80,000.00 and to make advances against accounts receivable. This case comes within the rule of *Diamond Alkali Co. v. P. C. Tomson Co.* 35 F 2d 117 and *Texas Industries v. Brown*, 218 F2d 510.

In *Diamond Alkali Co. v. P. C. Tomson Co.*, 35 F 2d 117 (CCA-3 1929) defendant agreed to purchase its entire requirements of soda ash, caustic soda and bicarbonate of soda from plaintiff, “which agreement shall continue for a period of five years from January 1, 1926.”

Plaintiff loaned defendant \$100,000.00 to construct a new plant. Defendant operated and purchased its requirements from plaintiff for about one year and a half. Then it sold its business and ceased to have requirements. In holding that the sale of its plant constituted a breach of contract, the court said at p. 120 of the opinion:

“When the defendant sold, not the Philadelphia real estate, but the manufacturing assets and good will coupled with an express agreement not to

engage in business for five years, it put itself in a position in which it could not carry out its contract with the plaintiff, and so breached it."

The language of the contract relating to its term is set forth on p. 117 of the opinion and provides that defendant was to purchase "the entire requirements of The Tomson Company of soda ash, caustic soda, bicarbonate of soda, according to the terms and conditions in said agreement (attached to the contract specifying grades of material, manner of packing, times of payment, etc.), *which agreement shall continue for a period of five years from January 1, 1926.*" (Emphasis ours). This is strikingly similar to the present contract which provides that it "shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50 months."

The court held that the contract required defendant to continue in business and operate for the term of the contract. At p. 119 the court said:

"Was it intended and implied by the parties that the defendant would continue in business and operate for five years? There was a period during which it was understood that 'the term of this contract' was to run. There is no intimation that 'the term' was to be other than the five years mentioned."

Likewise, in our case there was a period during which it was understood that the contract was to run and there is no intimation that the term was to be other than the 50 months mentioned.

At p. 119 the court said:

“All the negotiations between the parties, the entire contract with all its covenants and the entire enterprise of the parties were based upon the proposed ‘continuance’ of the contract for ‘the term’ of five years. The fulfillment of their undertakings necessarily implied such a continuance. The parties in good faith contemplated performance of the covenants requiring the defendant to purchase all its specified supplies from the plaintiff for five years and implicit in these negotiations and stipulations was the bona fide operation by the defendant of its manufacturing plant at Fairport for that period. The defendant did not intend to do otherwise until an unexpected opportunity to make ‘an advantageous sale’ presented itself.”

In the present case “an advantageous sale” opportunity presented itself to Sutherlin when the plywood market improved in the summer of 1954. And as in the Diamond Alkali case the sale disabled Sutherlin from carrying out its contract.

Also on p. 119 of the opinion the following appears:

“Whenever a contract cannot be carried out in the way it was obviously expected that it would be carried out without one party or the other perform-

ing some act not expressly promised by him, a promise to do that act must be implied. 3 Williston on Contracts, p. 2341; E. I. Du Pont, etc., Co. v. Schlottman (C.C.A.) 218 F 353; Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co. (C.C.A.) 239 F 603. The fact that the contract did not in express terms say that the defendant would continue in business for five years did not relieve it from performing their mutual intention as indicated by the express covenants, and in order to do so, it had to continue in business. Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co., *supra*; Wells v. Alexander, 130 N.Y. 642, 29 N. E. 142, 15 L. R. A. 218; Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C.C.A.) 121 F. 298, 61 L. R. A. 402."

In the recent case of *Texas Industries, Inc. v. Brown*, 218 F 2d 510 (CA-5 1955) appellant had a contract with the first group of appellees to supply its requirements of light aggregate for three plants for five years. While the contract still had 44 months to run the three plants were leased to the second group of appellees which refused to accept further deliveries under the contract. The trial court held that there was no breach of the contract and no inducement to breach. In reversing Holmes, J. said at p. 512:

"In our opinion, neither a sale nor lease of the three block plants, nor an assignment of the contract, by the buyers could in law effectuate a release of their obligations under the contract without the

consent of appellant. The written agreement shows on its face that the requirements of the three block plants were the subject matter of the sale, and were within the contemplation of the parties. The plants have not been sold; they have not been shut down; they have not been dismantled; they have never ceased to operate and to have requirements. They are operating under a lease from the Browns, who signed the contract and who are still very much interested as individuals in the operation of the plants. Much of the value of the rights reserved to the lessor under the lease depends upon the continuing operation of the plants.

“In these circumstances, the law of Texas imposes an implied obligation upon the buyers to keep the plants in operation lest, by disposing of them or shutting them down, the buyers be permitted to destroy the subject matter of the contract, the requirements of the plants, in violation of the intention of the parties that sales and purchases under it would continue for the full term thereof. This rule was recognized in a decision of the Supreme Court of Texas in 1951, *Portland Gasoline Co. v. Superior Marketing Co., Inc.*, 150 Tex. 533, 243 S. W. 2d 823, 825, wherein was cited *Williston on Contracts*, Rev. Ed., Vol. 1, pp. 357-358, which refers to a class of cases that finds from the business situation, from the conduct of the parties, and from the startlingly disproportionate burden cast upon one of them, a promise implied in fact by the seller to continue in good faith sales or production, or on the part of the buyer to maintain his business or plant as a going concern, and to take its bona fide requirements. ‘In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party’.”

In the present case there is (even without the express provisions of the contract) "a promise implied in fact by the seller to continue in good faith sales or production" and to maintain its "business or plant as a going concern."

C. The trial court was of the opinion that Sutherlin was excused from performing "by reason of its financial losses, insolvency and inability to produce further" (Conclusion VII). Note that there is no finding of insolvency and the evidence shows that Sutherlin was not insolvent at any time.

There is no evidence in the record and no finding that Sutherlin was disabled from performing for the life of the contract. The only finding of fact relative to Sutherlin's inability to perform is that it was disabled from performing at the time of the sale and at the time it ceased operations (Finding XXII, Tr. 59). But there is no evidence in the record to support this finding and every reasonable inference from the evidence is that Sutherlin could have performed. Nordic proved this by successfully operating the plant on capital of \$20,000.00.

There is absolutely no evidence of permanent inability of Sutherlin to perform. There is some general testimony that Sutherlin tried and failed to obtain working capital at sometime or times after April (Tr.

179, 192-193). But when? There is not one shred of evidence as to when these attempts were made or how much was needed, and no explanation is offered as to Nordic's successful operation of the same plant with far less financial backing than Sutherlin had, but with liabilities three times as great as Sutherlin's. Sutherlin's liabilities on May 31, 1954, were \$213,270.10 (Ex. 5, 131) and Nordic's liabilities on September 30, 1954, were \$679,319.19 (Ex. 6, 133)!

In the absence of evidence concerning when these unsuccessful attempts were made, it is clear that we do not know whether they were made from June to September 1954 when the demand and prices for plywood were at an unprecedented high and when Nordic managed to obtain financing to run the mill.

In view of Sutherlin's continuing duty to try to get its mill in operation, and since there is no evidence that it could not obtain working capital to do this at all times or at any specific time, between April and September, 1954, it is perfectly clear that a finding that Sutherlin was unable to perform during the remaining life of the contract would be unwarranted by anything in the record. If the court's finding that Sutherlin was disabled from performing at the time of the sale (Finding XXII) means that Sutherlin was disabled from performing for the life of the contract, it is wholly unsupported by the

evidence. If that finding means that Sutherlin was merely temporarily disabled, that would, of course, not support the judgment.

As our Exhibits 27 and 28 and the undisputed testimony of Henry L. Thompson shows (Tr. 140) the market price of plywood was at a low of \$76.00 until the middle of June, 1954, having dropped from \$85.00 since January, 1954. This probably explains the testimony of Steinbach, secretary of Sutherlin, that when certain officers of Sutherlin contacted the local bank and the U. S. National Bank in Roseburg for a loan, they were told that it probably would not be possible for Sutherlin to get a loan from any other bank (Tr. 192). But it is obvious that financing could have been obtained after the price and demand for plywood soared to the highest in the history of the industry following the strike in June, 1954 (Tr. 88). But we don't have to speculate as to whether financing was available in those market conditions. Nordic's operation, its balance sheets and income statements (Ex. 6, 133) prove that it was.

The hard and simple fact of the matter is that Nordic got the mill going with \$20,000.00 cash, \$7,000.00 less than the average monthly payroll of Sutherlin during the time it operated (Tr. 184), and far less than the cost of veneer which would have been financed for Sutherlin by appellant under the contract (Ex. 2).

We wish to clearly spell this out. The initial investment of Adams and Jacobson in Nordic was \$50,000.00 (Tr. 231). Of this, \$20,000.00 was paid to Sutherlin (Ex. 122, pp. 1 h). Nordic's balance sheet as of September 30, 1954 (Ex. 6, 133) shows that another \$10,000.00 was subscribed and unpaid capital stock during the first month of operations (D Ex. 133), which leaves \$20,000.00 in cash to get the mill in operation. Nordic financed its accounts receivable through a bank (Tr. 232), while the contract (Ex. 1) required appellant to finance Sutherlin's accounts receivable at no charge. To top it all off, Nordic had a tremendous disadvantage which Sutherlin did not have. Nordic had to purchase green veneer with its own funds (Tr. 231). During the first three months this came to \$39,835.61, \$92,794.11 and \$97,500.82 (Ex. 133). Sutherlin would not have had those outlays for veneer because appellant was required to purchase the veneer for it (See Exhibit 2). Nordic borrowed heavily from banks to finance its operations. See its balance sheets for October, November and December, 1954, (Ex 6, 133). And all of these loans, it must be remembered, came at a time when Nordic was mortgaged to the hilt to Sutherlin for over \$600,000.00.

These are the facts which the trial court failed to recognize. \$20,000.00 or less in cash was all that was

needed to reopen the mill. We would have provided several times this amount each month in veneer purchases for Sutherlin. We would have sold its plywood, sparing it this effort which Nordic had to put forth. We would have financed its accounts receivable saving interest charges. The only thing that Sutherlin had to do was operate the mill. Cash for its payroll would have been forthcoming almost as soon as the cars of plywood left the plant and before the payroll was due. Nordic's operation of the same mill was successful and its success is not difficult to explain. The market was at an all time high (Tr. 88). Sutherlin could have done even better because of its advantages under the contract with appellant.

All that this Court need conclude is that evidence is lacking to support the conclusion that Sutherlin was permanently disabled from operating because it had so-called financial difficulties. As we have demonstrated, there is no evidence in the record to support this conclusion and this Court should rule that Sutherlin was not excused from performance by its flimsy contention of financial difficulty.

Turning to Sutherlin's liabilities, its balance sheet of May 31, 1954 (Ex. 5) shows liabilities of approximately \$213,000.00. Of this Sutherlin owed us \$77,000.00 leaving \$136,000.00 owing to others (See D. Ex.

134). These liabilities do not account for Sutherlin's inability to reopen. For the creditors to whom they were owing were willing to wait and receive payment from the operations of the mill. They did wait for payment and were paid out of the money paid by Nordic to Sutherlin. Of the \$136,000.00 owing to creditors besides ourselves, how much was currently due and owing from April to September, 1954? The defendants chose not to tell the court. Surely, if we do not know the amount of Sutherlin's debts which were due or to become due, we do not know whether Sutherlin could have met them in the ordinary course of business and, therefore, we do not know whether it was insolvent in the sense that it could not meet its current liabilities as they became due. Although Sutherlin had liabilities of only \$213,270.10 (May 31, 1954 balance sheet, Ex. 5, 131), Nordic had liabilities on September 30, 1954 of \$679,319.19 (Ex. 6, 133), three times as great! Was Nordic disabled from continuing production? Of course not and neither was Sutherlin.

Furthermore, there is no showing that the value of Sutherlin's total assets was less than its total liabilities during the period involved. According to Sutherlin's May 31, 1954 balance sheet its liabilities were \$213,270.10 (Ex. 5, 131). Its mill was sold for \$660,000.00. The value of its assets exceeded liabilities by \$446,729.90!

Let us now examine those few debts which Sutherlin chose to elaborate in illustrating its so-called financial hardships and the asserted severity with which the creditors were about to exact their due. Did any of these creditors try to obtain a judgment lien? The answer is in the testimony of Steinbach, secretary of Sutherlin, (Tr. 120):

“Q. What I am asking is whether at the time you shut down in April there were then pending any lawsuits? Had anybody sued Sutherlin at that time?

A. Oh, no.

Q. Pardon?

A. No, sir.

Q. Has anybody sued Sutherlin since that date other than the plaintiff in this case?

A. No, sir; not to my knowledge.”

All the sound and fury about financial difficulty subsides to an inaudible whisper in the face of this mute but eloquent testimony by the creditors.

D. There is no proof that Sutherlin was insolvent, but neither insolvency nor financial difficulty would excuse Sutherlin's non-performance of its contract.

The court concluded that “Defendant Sutherlin Plywood Corporation was excused from furnishing

plaintiff with further production of plywood and from honoring further orders of plaintiff by reason of its financial losses, insolvency and inability to produce further (Conclusion of Law VII Tr. 65)."

That this erroneous conclusion is the basis for the trial court's denial of appellant's claim is made clear by the following colloquy at the conclusion of the trial (Tr. 254):

"Mr. Anderson: Is your Honor holding that financial difficulties are an excuse for performance?

The Court: Yes, I am holding precisely that."

We believe there is absolutely no authority for the holding that financial difficulties of a promisor excuse his performance of contractual obligations.

The following indicates that no such excuse is recognized in Oregon:

"The fact that the work was more expensive than plaintiff or any one else anticipated is no excuse for his failure to comply with the terms of the contract." *Hanthorn v. Quinn*, 42 Or 1, 13, 69 Pac 817 (1902).

The court's conclusion that financial difficulties excused Sutherlin's performance is clearly erroneous and requires that this decision be reversed.

II

The court erred in failing to find and conclude that Nordic tortiously interfered with and induced a breach of appellant's contract with Sutherlin.

SUMMARY

A. Nordic tortiously interfered with appellant's contract with Sutherlin and wilfully induced a breach thereof.

B. The grounds on which the trial court absolved Nordic of liability are erroneous and the record contains no other basis which will support the trial court's conclusion.

C. There is a presumption that Sutherlin's contract can be performed and there is no evidence to the contrary.

A. Nordic tortiously interfered with appellant's contract with Sutherlin and wilfully induced a breach thereof.

Nordic's President, John R. Adams, and its Secretary-Treasurer, Norman H. Jacobson, admitted that they knew of Sutherlin's sales contract during the negotiations for the sale, and that Nordic's purchase of the mill would disable Sutherlin from performance of that contract (Tr. 132, 135). Yet, Nordic actively solicited the purchase of the mill (Tr. 230), made an offer (Tr. 129) and consummated the purchase in September, 1954 (Tr. 27). Nordic never intended to furnish

appellant the output of the mill (Tr. 28) to which it was entitled under the contract.

Nordic pursued an active course of conduct which it *knew* would result in the destruction of appellant's contract rights. It admits and stipulates in the agreed facts that it knew its purchase of the Sutherlin mill would disable Sutherlin from furnishing plywood to appellant (Tr. 31) and that Sutherlin "would not be able to comply with the contract" (Tr. 133) after the sale of the mill.

Under these circumstances, it seems clear that Nordic tortiously interfered with appellant's contract and wilfully induced a breach thereof. Prosser on Torts (2d Ed.) 729.

B. The grounds on which the trial court absolved Nordic are erroneous, and the record contains no other basis which will support the trial court's conclusion.

We believe we have established that Sutherlin was bound to continue in operation and sell us 80% of its output during the term of the contract. The record is undisputed that Nordic knew of this contract and knew that Sutherlin could not perform it if the mill was sold. Nordic nevertheless successfully induced Sutherlin to sell its mill to it by making an offer to purchase which Sutherlin accepted. In view of these undisputed facts,

Nordic intentionally induced a breach of contract and, consequently, must respond in damages to the extent that they have resulted from the breach. The tort of interference with contractual relations is recognized in Oregon; *Ringler v. Ruby* 117 Or 455, 244 Pac. 509.

The trial court held that Nordic did not tortiously interfere with out contract with Sutherlin apparently because it thought that Sutherlin was excused from performing. According to the trial court, since Sutherlin's non-performance was excused, so was Nordic's conduct interfering with out contract and inducing non-performance. The validity of this conclusion is doubtful even if the trial court had been correct in concluding that Sutherlin's non-performance was excused. It is the rule that unjustified interference with a contract which the promisor is privileged not to perform, such as contracts which are terminable at will or unenforceable because they do not comply with the statute of frauds, is nevertheless wrongful. Prosser on Torts (2d Ed. 1955) 725-26.

However, notwithstanding this, as we have demonstrated, Sutherlin was bound to continue production and sell to us during the life of the contract. Its non-performance was not to be excused except on grounds which traditionally excuse non-performance. Financial difficulty is not one of these grounds. Since Sutherlin's

non-performance was not excused, the trial court's conclusion that Nordic's conduct did not interfere with our contract rights is erroneous. There are no other grounds in the record which support the trial court's conclusion that Nordic "did not unlawfully interfere with said agreements or induce a breach thereof" (Conclusion IX). The evidence is undisputed that Nordic purchased the Sutherlin mill and that the purchase made it impossible for Sutherlin to carry out its contract with appellant.

C. There is a presumption that Sutherlin's contract could be performed but for the interference by Nordic.

The following appears in Prosser on Torts (2d Ed. 1955) at p. 725:

"The law of course does not object to the voluntary performance of agreements merely because it will not enforce them, and it indulges in the assumption that unenforceable promises will be carried out if no third person interferes. Accordingly, it is usually held that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms still afford a basis for a tort action when the defendant interferes with their performance."

If the law assumes that even unenforceable contracts will be performed if no third person interferes,

there is an *a fortiori* presumption that an enforceable contract, such as this one, would have been carried out if Nordic had not interfered by intentionally participating in the act which disabled Sutherlin from performing.

There is no evidence that Sutherlin would not have continued production if Nordic had not purchased the mill. With price and demand for plywood at an unprecedented high level, Sutherlin could have produced if it had tried. Nordic's purchase of the mill destroyed the possibility of performance. Having made Sutherlin's performance impossible, Nordic should not now be heard to say that Sutherlin might not have performed anyway. Furthermore, Nordi's operation in the same mill shows that Sutherlin could have operated if it had tried.

III

The court erred in failing to find that Sutherlin and Nordic are responsible to appellant for damages.

SUMMARY

A. Sutherlin and Nordic are liable to appellant for damages in the amount of \$72,000.00 up to the time of trial. Sutherlin is liable to appellant for an additional \$20,000.00 up to the time of trial.

B. Further proceedings should be had in the trial court to fix the amount of damages between the time of trial and the date of the judgment.

The proper measure of damages to be assessed against Sutherlin is the profit appellant would have made had performance been forthcoming less expenses which appellant would have incurred in making that profit. *Fayette Kanawha Coal Co. v. Lake & Export Coal Corporation* 91 W. Va. 132, 112 SE 222; Restatement of Contracts Sec. 329.

After Sutherlin closed its mill, we could not place orders with others on the same terms as those in our contract with Sutherlin (Tr. 145). The 60 month contract would not have expired until 1959. Appellant had available and could have submitted to Sutherlin \$100,000.00 in orders per month from the shut down of the mill on April 21, 1954 until the strike in June, 1954 (Tr. 91, 140). After the strike in June, 1954 appellant had available and could have submitted orders in the amount of \$200,000.00 each month (Tr. 92, 141).

While the evidence is that we could have submitted orders in the amount of \$200,000.00 after the strike in June, 1954 we will limit our claim to damages based upon orders of \$100,000.00 per month since the evidence is undisputed that orders in that amount could have been handled by Sutherlin. That the mill could

have produced plywood to fill those orders is proved by Nordic's production in excess of that amount (See Exhibits 6, 133) at all times since September, 1954.

Exhibits 6 and 133 show the amount of production and sale value of the plywood produced after September, 1954. In September, Nordic's total sales were \$54,249.78. In October, 1954, its sales were \$146,638.58. In November, 1954, its sales were \$136,580.39 and in December, 1954, its sales were \$221,177.64. Its production and sales were maintained at that level or above for the remainder of the period until the time of trial on March 27, 1956, a period of more than 18 months and its average was well above \$100,000.00 per month.

The average production and sales of the mill would have entitled us to much more than purchases of \$100,000.00 per month, but to be conservative we will compute our damages only on the basis of orders totaling \$100,000.00 per month. The record fully supports a recovery on this basis.

Appellant's gross profit was 5% (Tr. 95) and based on sales of \$100,000.00 would have been \$5,000.00 per month (Tr. 95). From the gross profit there should be deducted the cost of sales. The cost of sales would have been not more than \$1,000.00 per month for sales of \$100,000.00 (Tr. 95). Appellant's damages are \$4000.00 per month (Tr. 95). For the 18 months from Sep-

tember 27, 1954 to the trial on March 27, 1956, appellant's damages are \$72,000.00. For the period from April 21, 1954 to September 27, 1954, approximately five months, our damages were \$20,000.00.

There are three views concerning the proper measure of damages against Nordic for interfering with and inducing a breach of contract; 30 Columbia L. Rev. 232. One view allows contract damages. Another permits a larger recovery which includes those damages that are proximately caused by the tort. A third goes even further and allows the recovery of damages as in the case of an intentional tort. No problem is presented here concerning which rule to apply because we claim only for the loss of our bargain or contract damages.

The record presents no question of fact concerning the amount of damages and we are claiming only the minimum amount. This court should direct the trial court to enter judgment against both Sutherlin and Nordic for \$72,000.00 and against Sutherlin for an additional \$20,000.00 damages up to the date of the trial on March 27, 1956.

This court should also direct the trial court to fix the damages incurred since the date of trial by appropriate proceedings.

IV

Sutherlin and Nordic should be enjoined from carrying out their wrongful purposes and required to grant appellant the right to purchase 80% of the output of the mill under the terms of the contract.

In the present case Sutherlin granted to appellant the right to purchase 80% of its output for 60 months. While the contract does not contain a negative clause that it will not sell or permit its production to be sold to others during the term of the contract, the law implies such a prohibition.

In *Lumley v. Wagner*, 1 De Gex M & G 604 Miss Wagner agreed to sing for plaintiff and not to sing elsewhere for three months. In enjoining Miss Wagner from singing elsewhere, the lord chancellor said:

“The agreement to sing for the plaintiff, during three months, at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipu-

lation, to perform at another theater, she would have broken the spirit and true meaning of the contract, as much as she would with reference to the contract into which she has actually entered.' ”

In *Cort v. Lassard and Lucifer*, 18 Or 221, 22 Pac 1054 (1889) the rule of *Lumley v. Wagner* supra was adopted in Oregon. Lord J. said at p. 226 of the opinion that the principle is the same “even though the contract contains no negative stipulation; for, in the nature of things, a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time, of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed.”

In *Phez Co. v. Salem Fruit Union*, 103 Or 514, 201 Pac. 222, 205 Pac. 970, plaintiff contracted with the defendant cooperative to buy the entire crops of loganberries of certain member growers. The cooperative made separate contracts with the growers. The crop was not delivered and plaintiff sued both the cooperative and the growers seeking an injunction to prohibit both

the cooperative and the growers from selling their crop. The court held that a cause of action was stated against the defendant growers and expressed three theories of liability. Two were contractual, but the third sounded in tort. At p. 551 the court said:

“If the defendants be regarded as strangers to the contract of sale between the fruit union and plaintiff, as contended by defendants, the complaint is still sufficient as to the defendant growers under the rule that where a stranger wrongfully induces another to commit a breach of contract, or intentionally disables such other from discharging the obligations of his contract, the wrongdoer is liable in damages, or in a proper case may be enjoined from carrying out his wrongful purposes . . .”

In the Phez case the court applied the doctrine of *Lumley v. Wagner*, supra and *Cort v. Lassard & Lucifer*, supra. At page 534 of the opinion the court said:

“While it is practically impossible to compel specific performance of a contract of this nature, there is abundant authority that the court may by enjoining the contractor from selling his wares to anyone else, place him in a position where his own interests may be powerful enough to induce him to perform his contract.”

At p. 535 the court said in speaking of the power to enjoin:

“The present case is one where the invoking of this power might be peculiarly efficacious. The growing of loganberries is a new industry; their production is limited to a comparatively small area; they are perishable fruit incapable of shipment in a raw state to distant markets; and had the court below seen its way clear to enjoin the defendant growers from making delivery to any other party than this plaintiff, it seems almost inevitable that the contract would have been observed and the business which the complaint indicates the plaintiff had so assiduously and expensively labored to build up would have been saved from embarrassment and possible destruction.”

It is clear that the law of Oregon authorizes an injunction preventing both the output promisor and the interferer from selling the output of the mill to anyone but the party rightfully entitled to it.

In the Phez case the court indicated that the defendant growers should have been enjoined “from making delivery to any other party than this plaintiff.” So in the present case, Nordic which has wilfully interfered with our contract and prevented performance, should be enjoined “from making delivery to any other party than” appellant.

In the Phez case the individual growers, as strangers to the contract between the buyer and the cooperative had an output which in equity and good conscience belonged to the buyer. Here Nordic is similarly situated and has an output which in equity and good conscience belongs to appellant. An injunction should be issued preventing disposal of 80% of the mill's output to anyone but appellant under the terms of the contract.

CONCLUSION

Sutherlin made an agreement whereby it granted to appellant the right to purchase up to 80% of its output of plywood. Sutherlin agreed to accept and ship appellant's orders. Sutherlin agreed that the contract should continue in full force and effect from the beginning of production for at least 50 months.

As its part of the bargain appellant was required to and did (1) loan Sutherlin \$80,000.00, (2) finance purchases of veneer for Sutherlin, (3) finance accounts receivable for Sutherlin and (4) supply Sutherlin with orders.

After the contract was made with Sutherlin, appellant ceased looking for other sources of plywood (Tr. 84).

The contract expressly states that it is to continue for at least 50 months. To carry out the purpose of the

contract, Sutherlin had to stay in operation for the term of the contract. But despite its obligation under the contract, Sutherlin operated only from January to April, 1954, when it ceased operation and failed to accept and ship appellant's orders as it had expressly promised to do.

When the plywood market improved in June, 1954, there was an unprecedented demand for plywood (Tr. 88) and, of course, for plywood mills. Sutherlin determined to make an advantageous sale and sold the mill for \$660,000.00 to Nordic.

Both Sutherlin and Nordic knew that the sale of the mill would disable Sutherlin from further performance of its contract with appellant. But they went right ahead with the sale and disabled Sutherlin from performing its contract.

Now Sutherlin and Nordic contend that Sutherlin's financial difficulties excused it from performing its contract. This novel doctrine has no support in the authorities and its acceptance by the trial court is clearly erroneous.

But the financial problems of Sutherlin did not prevent its performance. Sutherlin had liabilities of only \$213,270.10 on May 31, 1954 (Ex. 5, 131). Nordic started up the mill in September, 1954 with liabilities

of \$679,319.19 (Ex. 6, 131) and had no trouble obtaining financing. Furthermore, Nordic had to obtain financing for green veneer purchases, the major expense, and to discount its accounts receivable at the bank. Veneer would have been purchased for Sutherlin by appellant and it would have needed no accounts receivable financing because appellant was obligated to make advances against production. The sum of the matter is that neither the facts nor the law support Sutherlin's claim that it was excused from continuing its operation for the term of the contract because of its financial difficulties.

Nordic's successful operation of the mill proves—if any proof is needed—that it was possible to operate the mill during the period when the demand for plywood and the price of plywood were at the highest point in the history of the industry. Nordic successfully operated the mill from September, 1954 until the time of trial on March 27, 1956.

Since April 21, 1954 neither Sutherlin nor Nordic have supplied appellant with any plywood. After Sutherlin breached its contract appellant was unable to procure plywood on a similar basis elsewhere (Tr. 87), and was damaged at least \$4,000.00 per month (Tr. 93, 95) from April 21, 1954 to March 27, 1956, the date of the trial. Nordic is equally responsible for the damages from

September, 1954 to March 27, 1956 or in the sum of \$72,000.00. Sutherlin is responsible for an additional sum of damages for the period between April 21, 1954 and September, 1954 or \$20,000.00.

To prevent further destruction of appellant's contract rights and further litigation, Nordic should be enjoined from selling 80% of the output of the mill to anyone other than appellant pursuant to the terms of the contract.

This court should reverse the trial court's decision and hold as follows:

1. Financial difficulties are *not* an excuse for non-performance of contractual duties.

2. The contract herein both expressly and by implication requires Sutherlin to continue in operation for the term of the contract lest by disposing of the plant or shutting it down, Sutherlin be permitted to destroy the subject matter of the contract, the output of the plant, in violation of the intention of the parties that sales under the contract would continue for the full term thereof.

3. Sutherlin breached its contract by failing to operate after April 21, 1954 and by disabling itself from performance by selling its mill to Nordic on September 7, 1954.

4. Nordic interfered with appellant's contract rights and induced a breach of its agreement with Sutherlin by purchasing the Sutherlin mill thereby disabling Sutherlin from the performance of its contract.

5. Judgment should be entered in favor of appellant and against Sutherlin and Nordic for the sum of \$72,000.00, against Sutherlin for a further sum of \$20,000.00 and the trial court should fix the amount of damages occurring since the trial on March 27, 1956.

6. Nordic should be enjoined from selling 80% of the output of its mill to anyone other than appellant pursuant to the terms of its contract.

Respectfully submitted,

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No. 15271

In the
United States Court of Appeals
For the Ninth Circuit

OREGON PLYWOOD SALES CORPORATION,

Appellant,

v.

SUTHERLIN PLYWOOD CORPORATION and NORDIC
PLYWOOD, INC., *Appellees.*

APPELLEES' BRIEF

Appeal from the United States District Court for
the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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No. 15271

In the
United States Court of Appeals
For the Ninth Circuit

OREGON PLYWOOD SALES CORPORATION, *Appellant*,

v.

SUTHERLIN PLYWOOD CORPORATION and NORDIC PLYWOOD, INC., *Appellees*.

APPELLEES' BRIEF

Appeal from the United States District Court for
the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLEES' STATEMENT OF THE CASE

Because the statement of the case set forth in Appellant's Brief (pp. 2-7) is incomplete, argumentative and in some respects inaccurate, the following statement is submitted to the court: ¹

Appellant, Oregon Plywood Sales Corporation, purchases plywood from plywood manufacturers, includ-

¹ In keeping with their descriptions in Appellant's Brief, appellee Sutherlin Plywood Corporation will be referred to as Sutherlin and appellee Nordic Plywood, Inc., will be referred to as Nordic.

ing its parent corporation, Oregon Plywood Corporation. Its purpose in doing so is to resell that plywood to others (Finding II, R. 51). Its method of operation, at least with Sutherlin, was to obtain an order from one of its customers, place its own order therefor with the manufacturer and require that shipment be made direct to the ultimate purchaser (see Exs. 125, 126). Its activities, then, partook of the nature of both wholesaler and broker.

Sutherlin had completed construction of a "plywood lay-up mill" at Sutherlin, Oregon, in October, 1953. Its operations involved employing primarily its stockholders for its labor force (Finding X, R. 55; R. 169). It lacked working capital when it was first contacted by Robert F. Hofheins (Vice-president, Treasurer and a Director of Oregon Plywood Corporation, and Secretary, Treasurer and a Director of appellant), and this was the fact, known to all concerned, which brought these organizations together (Finding II, R. 51; R. 72). Although Sutherlin's balance sheet at that time showed a net worth of \$464,527.69, it also showed that the assets were made up largely of fixed assets and equipment being purchased on installment contracts, that included in the computation of "assets" was \$19,452.26 "organization expense" and that its capital was in fact impaired (Ex. 131-A).

The contracts which resulted from these circumstances were the following, all executed on December 17, 1953:

1. A sales contract with appellant, here alleged to have been breached, which provided that

“In consideration of the benefits to be derived by each party hereto, Party of the First Part [Sutherland] gives and grants unto Party of the Second Part [appellant] the right to purchase up to 80% of the *output* of Party of the First Part when Party of the First Part gets into production, and Party of the First Part agrees to accept up to 80% and ship Party of the Second Part's orders as specified and within a reasonable time.” (Ex. 1; it is set out at length R. 12-17)

2. A loan agreement with Oregon Plywood Corporation which provided for two types of loans to Sutherland, namely, the loan of \$80,000 to be secured by notes and a mortgage at 4 per cent interest, and the advance of the cost of green veneer (security title retained therein by lender) at no interest (Ex. 2).

3. A note to Oregon Plywood Corporation for the first \$50,000 loaned (Ex. 114).

4. An open-end mortgage to Oregon Plywood Corporation to secure said note and future loans (Ex. 115).

The sales contract (Ex. 1), while requiring Sutherland to sell 80 per cent of its output, did not require ap-

pellant to purchase anything. Other than the illusory promises of appellant to "advance" part of the invoice price of the plywood which it might decide to order and to use its "best effort" for Sutherlin, the only consideration for the sales contract was embodied in the promises of Oregon Plywood Corporation in the loan agreement (Ex. 2) and in the loans and advances made by it (not appellant) pursuant thereto. This fact gave rise to appellees' contentions below that the extra 5 per cent discount off the wholesale jobber's market price which Sutherlin was bound to give appellant was induced solely by loans of money and, in effect, constituted usurious interest. (No findings were made on that contention by the trial court.)

The record does not disclose whether Robert F. Hofheins procured these loans and advances acting as an officer and director of appellant, as seems to be contended by plaintiff (see Pre-trial Order, R. 31, and App Br., pp. 2-3). He signed each agreement on behalf of the corporation with which it purports to have been made. Likewise, there was no evidence that appellant, as distinguished from its parent corporation, agreed to obtain these loans.

In January, 1954, Sutherlin commenced to operate its newly constructed mill. So long as it operated the mill it sold to appellant at least 80 per cent of its actual

output (Finding X, R. 55; R. 85). Operations were unprofitable from the beginning, however, and by April 21, 1954, it had lost therefrom more than \$110,000, had exhausted its working capital and credit, and had twice failed to meet its payroll on time. Its average loss had been \$34.02 per thousand board feet of plywood produced. With its available cash completely depleted, and finding it impossible to continue, Sutherlin terminated production on that date and since that time has had no output (see Finding X, R. 54-55; Exs. 131-C to 131-G).

Numerous and concentrated efforts to obtain additional financing to reopen the mill after April 21, 1954, understandably met with no success (Findings XIV, R. 56, and XV, R. 57; R. 127, 179, 192, 193, 226). In June, 1954, the stockholders authorized the directors to seek to sell or lease the mill; on July 28, 1954, the directors (at a meeting attended by appellant's officer and director, Robert F. Hofheins) recommended a sale or lease of substantially all the assets of the corporation; and in early August, 1954, the corporation accepted an offer from J. R. Adams and Norman Jacobson for the sale and purchase of its physical assets. That offer had been made pursuant to the invitations of Sutherlin (Findings XVI, XVII, XVIII, R. 57-58). Thereafter, Messrs. Adams and Jacobson caused Nor-

dic to be incorporated and the sale was made to Nordic in September, 1954, for \$660,000, payable \$20,000 down and \$5,500 a month without interest. Under this sale the installments on the purchase price are paid into escrow and distributed to creditors and any remaining equity will ultimately be distributed to Sutherlin and its stockholders. The loans from Oregon Plywood Corporation were paid and a new mortgage taken by a bank (Findings VII, XIX, XXI, R. 53, 58-59; Exs. 120, 121, 122, 123 and 124).

There is no organizational relationship between Sutherlin and Nordic and they have no common officers, directors or stockholders (Finding XIX, R. 59).

The trial court rejected appellant's contentions that by these acts Sutherlin had breached the sales contract and Nordic had unlawfully interfered with and induced the breach thereof. It construed the contract as an output contract whereby Sutherlin was bound to sell only 80 per cent of its actual production and had not agreed expressly, impliedly or otherwise to continue production. Therefore, Sutherlin could shut down and cease operations and could sell its mill if it should determine to do so in good faith and in the exercise of honest business judgment. The court did *not* hold, as appellant asserts, that financial difficulties are an excuse for non-performance *generally*. As the context of

the colloquy between court and counsel quoted in Appellant's Brief (pp. 4, 43) and Conclusions of Law II, III, IV, V, VI, and VII show, Sutherlin's losses were held an "excuse" in this case because they were the reasons for the decisions to cease operations and sell the mill. That is, these are the facts which negative appellant's contention of bad faith and support the findings of good faith.

The court found as a fact that Sutherlin acted in good faith (Finding XXIII, R. 59) and concluded that appellant had failed to prove its contention of bad faith (Conclusion V, R. 64). It also found that Sutherlin in fact had become disabled from having an output long prior to Nordic's appearance on the scene (Finding XXII, R. 59) and that Sutherlin, not Nordic, was the moving party in effectuating the sale of the mill (Findings XVI, XVII, XVIII and XIX, R. 57-58²).

QUESTIONS INVOLVED

The eight most important specifications of error (I through VIII) relate to findings of fact made by the trial court which were based upon evidence in the record. Of course, such findings will not be set aside

² These findings are not challenged by appellant.

unless appellant bears the burden of showing that they are "clearly erroneous."

Rule 52(a), *Federal Rules of Civil Procedure*.

Grace Bros. v. Commissioner of Internal Revenue
(CA 9, 1949) 173 F (2d) 170, 174

Findings of fact are not "clearly erroneous" unless unsupported by substantial evidence, clearly against the weight of the evidence or induced by an erroneous view of the law. In determining the correctness of the findings, the appellate court looks only to the evidence most favorable to them and such reasonable inferences as may be drawn from such evidence.

2 Barron and Holtzoff, *Federal Practice and Procedure* (1950) 834

Lewis Mach. Co. v. Aztec Lines (CA 7, 1949) 172 F (2d) 746

The only questions involved on this appeal are

(1) Did the trial court properly construe the meaning of the sales contract? Appellees contend that it did.

(2) Did Sutherlin act in bad faith in shutting down, ceasing operations and selling its mill? Appellees contend that there is no evidence of bad faith and that all the evidence supports the ultimate finding

(Finding XXIII, R. 59) that Sutherlin acted in good faith.

(3) In the event of adverse answers to the foregoing questions,

a. was Nordic's purchase of the mill the proximate cause of any breach of the sales contract by Sutherlin, and, if so,

b. was Nordic privileged to purchase the mill? Appellees contend there could be no causal relationship and that justification has been established.

(4) In any event, is the relief suggested by appellant available? Appellees contend that appellant can not recover more than nominal damages and that injunctive relief would be inappropriate.

ARGUMENT

I. Sutherlin Did Not Breach Its Contract.

(See Specifications of Error Nos. I, II, III, IV, V, VI, IX, X, XI, XII, XIII and XIV)

A. The Output Seller Retains the Right to Control Its Operations in the Absence of Bad Faith.

This is not the first case, or even nearly the first case, in which a manufacturer has agreed to sell its "output" for a definite period of time but has found it necessary to cease operations and, in some cases, to dispose of its plant. Judging from the number of re-

ported cases dealing with them, a good share of these contracts, and the converse situation, requirements contracts, have resulted in litigation. Frequently the output buyer (or the requirements seller) has contended that implicit in such contracts is the obligation of the output seller (or the requirements buyer) to continue to operate its plant and that it may not, by refusing to operate or by selling its facilities, "destroy the subject matter of the contract." These efforts in the main have proved unsuccessful.

Although the courts are not entirely uniform in their approach to or treatment of these contracts, the great weight of authority holds that, in the absence of bad faith, the output seller and requirements buyer retain their rights to control their operations. In fact, we have made a diligent search, and, except in an opinion of one judge, opposed by the other two judges on the case, we have failed to find a single case involving an output or requirements contract, *with no stated minimum to be sold or bought*, which has imposed a duty to continue operations in the face of financial loss. The cases refusing to find any such duty are legion. One of them, *William S. Gray & Co. v. Western Borax Co.* (CCA 9, 1938) 99 F (2d) 239, was decided by this court. Several cases decided by the Oregon Supreme Court, although not dealing with this precise situation,

imply that such is the law of Oregon. In view of the contentions made by appellant on this appeal, however, a review of the authorities seems in order.

1. *General Law*. Under modern authorities output and requirements contracts are not inherently void for lack of certainty or mutuality. The promise of a seller to sell his output and of a buyer to purchase his requirements may furnish consideration for a promise or act given in return. This, however, is placed upon the ground that, although such promisor *does not promise to sell any amount or to take any amount*, he nevertheless promises to suffer legal detriment: he relinquishes the right to have output or requirements and yet not sell or buy the same to or from the promisee.

1 *Williston on Contracts*, Rev. Ed. 353, § 104A

1 *Corbin on Contracts* 522, § 158

In fact the terms "output" and "requirements" are employed for the precise reason that the seller in an output contract or the buyer in a requirements contract wishes to retain the right to lessen or terminate his production or needs and the right to control his assets.

Annotation: 1 A.L.R. 1392-1397, "*Validity and construction of contract for sale of season's output*"

(p. 1393) "In construing contracts for the sale of the output of a manufacturing or producing plant

for a designated period of time, it is to be remembered that, by the use of this language, the parties to the contract have expressly refrained from contracting for the sale of any specific quantity of goods, material, or commodity. In this regard, however, the contract is not ambiguous, for the language used is clear. The term 'output' means the quantity of material put out or produced within a stated time. (See Century Dict.)"

See, also, supplementing the above annotation,

9 A.L.R. 276-278

23 A.L.R. 574-582

For similar treatment of requirements contracts, see

Annotation: 7 A.L.R. 498-516, "Construction of Contracts for sale of commodity to the extent of the buyer's requirements," pp. 506, 507; supplemented 26 A.L.R. (2d) 1099-1131

Probably the leading modern case in this field is

In re United Cigar Stores Co. of America (D.C. N.Y., 1934) 8 F. Supp. 243, affirmed (CCA 2, 1934) 72 F. (2d) 673, cert. den. sub. nom., *Consolidated Dairy Products Company, Inc., v. Irving Trust Co.* (1934) 293 U. S. 617, 79 L. ed. 706

In that case, after refusing to adopt the requirements contract which bankrupt-buyer had with claimant-seller, the trustee moved to expunge claimant's claim against the bankrupt's estate. The contract, law-

over-drawn, had provided that bankrupt would buy (and claimant would sell) all ice cream "required for its stores." Claimant had also agreed to sell to bankrupt, at over 50 per cent discount, 15,000 shares of claimant's stock and to give an interest in certain other stock options of another corporation. Bankrupt purchased its actual requirements from claimant until, during the term of the contract, it filed its voluntary petition in bankruptcy. The district court held that, although bankruptcy of a party to an executory contract does not excuse performance, here there had been no failure to "perform" because "requirements" were determined by the actual needs of the requirements-buyer, provided he did not act in bad faith. Reviewing the two main lines of authority, the district court stated as to the view it had adopted:

(p. 244) "Subterfuges or evasions would doubtless not be tolerated, but the buyer's conduct in good faith determines his requirements. The same effect is given to output contracts; if the seller cuts down his manufacture or even closes up his plant in good faith, he has still performed his undertaking. The weight of authority supports this construction of the ordinary requirements contract and the ordinary output contract. *H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co.*, 194 F. 69 (C. C. A. 5), certiorari denied in 225 U. S. 706, 32 S. Ct. 838, 56 L. Ed. 1266 (sale of business);" [citing numerous other cases]

As to the other view that reads into such contract an obligation to have requirements to *substantially the same extent as were its requirements when the contract was made*, the court stated:

(p. 245) "On principle this view of the ordinary requirements contract and the ordinary output contract is difficult to justify. * * * If the parties had intended that the buyer should be bound to take goods according to his requirements in the past, they would have expressed that intention or would have inserted a specific quantity as the amount to be purchased. If they had intended that the buyer should be obligated to have future requirements, they presumably would have inserted a minimum quantity as is quite usual in contracts of this character (see *Wigand v. Bachmann-Bechtel Brewing Co.*, 222 N. Y. 272, 118 N. E. 618; *Louisville Soap Co. v. Taylor*, 279 F. 470 (C. C. A. 6), or in some other manner have indicated that the buyer must continue to buy throughout the term."

Cited for support by the district court in the *United Cigar Stores* case was

H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co. (CCA 5, 1912) 194 Fed. 69, cert. den. (1912) 225 U. S. 706, 56 L. ed. 1266

Although this case is relegated by Appellant's Brief (p. 28) to not-even-up-to "ordinary" case status in appellant's four-fold classification, its similarity to the present case is striking. It involved an output contract for a definite term by which the defendant had agreed to sell (and the plaintiff to purchase) all of certain grades

of lumber (about 25 per cent of its total output) "as may be manufactured by them" for a period. In consideration of a loan of \$6,000 the contract was extended to November 1, 1903, but on March 31, 1903, the defendant sold its plant and no longer had any production. There was no contention of bad faith. The court held:

(p. 71) "The words do not import a promise to keep the mill in operation, nor to manufacture any quantity of lumber during the two years. Lumber manufactured by the mill of the grades in the contract specified, it was the duty of Pfann & Co. to sell and deliver to the Lumber Company at the contract price. But the words referred to cannot, by any reasonable rule of interpretation, be so construed as to divest Pfann & Co. of the right to dispose of their property in their own way and at any time deemed advantageous to themselves.

"To construe the words so as to deprive them of the right to sell the plant, there must be interpolated in the contract language which the parties themselves have failed to employ. In other words, we would thus make a contract for the parties which they have not made for themselves. A right so important as that of one to sell his own property should not be denied him unless the language employed clearly conveys that intention."

The view of the foregoing cases was in effect adopted by this court as the governing rule for the Ninth Circuit, in the absence of applicable local cases, in

William S. Gray & Co. v. Western Borax Co. (CCA 9, 1938) 99 F. (2d) 239

The contract involved in that appeal arose when defendant manufacturer acquired large borax deposits. Upon developing mines thereon and a refining plant it sought to enter the competitive field of boron products. The plaintiff, which had an existing distributing business, was established by the contract as exclusive agent for sale "of all the borax, crude and/or refined, borac acid and other products produced by" the defendant. The contract, which was to "continue in effect for ten (10) years," did not specify any minimum amount defendant was to produce. Upon suffering financial reverses, the defendant contracted for sale of its mines, deposits and refineries and thereafter produced no boron products. Judgment for the defendant was affirmed. After citing certain analogous California decisions (governing local law), the court's opinion, by Judge Denman, stated as follows:

(p. 243) "The reasoning of these California cases and of the authorities on which they rely, require us to hold that in this case the Borax Company did not agree to continue to produce from its properties and that there was no breach in their sale. If there was no such California opinion we would agree that its law is in accord with the opinion of the Fifth Circuit in *Pfann & Co. v. Turner Cypress Lumber Co.*, 194 F. 69, 70, certiorari denied 225 U.S. 706, 32 S.Ct. 838, 56 L.Ed. 1266. * * *

"The provision that the commission here is based on 'all' the borax 'produced' by appellee is identical

in principle with the provision in the Pfann case for the purchase of 'all' the 'lumber as may be manufactured by them'."

The above quoted language of the *Pfann* case was quoted at length. The court found no bad faith.

Because of the absence of a duty on appellant's part to buy any of Sutherlin's production, there can be no distinction between the *William S. Gray* case and the present case based upon the sales agency nature of the contract involved (See R. 83).

Representative of the many decisions in accord with the good faith test and the principles above enunciated are

Forth Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corporation (CCA 3, 1942) 130 F. (2d) 471 (75 per cent requirements contract; termination of operations as result of recession in defendant's business) and Pennsylvania cases cited therein.

William C. Atwater & Co., Inc., v. Terminal Coal Corporation (D.C. Mass., 1940) 32 F. Supp. 178, affirmed (CCA 1, 1940) 115 F. (2d) 887 (coal requirements contract; sale of business after financial losses)

Southwest Natural Gas Co. v. Oklahoma Portland Cement Co. (CCA 10, 1939) 102 F. (2d) 630 (gas requirements contract; change to new type of gas heating system resulting from exercise of business judgment)

Duboff v. Matam Corporation (1947) 272 App. Div. 502, 71 N.Y.S. (2d) 134 (home appliance exclusive agency of all produced; liquidation and sale of business)

In accord with these views are the other cases classified in appellant's "second pattern" (App. Br., p. 28), and also the following cases which hold that even the insertion of an estimated quantity (held not to be a warranty) does not change the rule:

Brawley v. United States (1877) 96 U.S. 168, 24 L. Ed. 622 (requirements contract for "necessary" wood; estimate of 880 cords but only 40 cords required; good faith test)

Kenan, McKay & Spier v. Yorkville Cotton Oil Co. (CCA 4, 1919) 260 Fed. 28 (season's output contract; bad faith not shown)

Kenan, McKay & Spier v. Home Fertilizer & Cotton Oil Co. (1918) 202 Ala. 29, 79 So. 367 (season's output contract; "lack of due diligence" is not bad faith)

Kenan, McKay & Spier v. Yorkville Cotton Oil Co. (1918) 109 S.C. 462, 96 S. E. 524 (season's output contract; inability to borrow is not bad faith)

Cf. Dawson Cotton Oil Co. v. Kenan, McKay & Spier (1918) 21 Ga. App. 688, 94 S. E. 1037 (on demurrer, complaint charging bad faith held sufficient)

The single opinion which we have found suggesting that an output seller (or requirements purchaser), in the absence of a stipulated minimum to be sold or bought, must continue to operate in the face of financial loss is that by Judge Cottrel in

Central States Power & Light Corp. v. United States Zinc Co. (CCA 10, 1932) 60 F. (2d) 832, cert. den. (1932) 287 U. S. 660, 77 L. ed. 570

However, the concurring opinion of Judge Lewis in that case construed the contract as containing a minimum quantity, thereby taking the case out of the "requirements" class, and there was a strong dissent by Judge McDermott. Furthermore, in a subsequent case in the Tenth Circuit involving almost the same type of contract, the good faith test was invoked.

Southwest Natural Gas Co. v. Oklahoma Portland Cement Co. (CCA 10, 1939) 102 F. (2d) 630 (supra, p. 17)

2. *Oregon Law.* While the precise question involved in this case has not been decided by the Oregon Supreme Court, the following case strongly implies that the good faith test is the rule in Oregon.

Standfield v. Arnwine (1921) 102 Or. 289, 202 Pac. 559

Here the plaintiff-buyer and the defendant-seller had entered into a contract whereby plaintiff paid defendant a \$5,000 deposit, and defendant covenanted to sell and deliver to plaintiff "about 3,800 head mixed lambs, being all of my 1918 crop." Defendant tendered 2,800 head, his entire 1918 crop. This was held sufficient. The court quoted at length from *Brawley v. United States* (1877) 96 U.S. 168, 24 L. Ed. 622 (supra, page 18) to the effect that the estimate was not a warranty, that the actual crop was the measure of performance and that all that is required of the producer in such case

is good faith. Also cited was *Kenan, McKay & Spier v. Home Fertilizer & Cotton Oil Co.* (1918) 202 Ala. 29, 79 So. 367 (*supra*, page 18).

In a similar case, *Otto Seidenberg, Inc. v. Tautfest* (1937) 155 Or. 420, 64 P (2d) 534, the court commented:

“The evidence shows good faith on the part of the grower and the exercise of good husbandry in an effort to produce the maximum amount of hops contracted to be sold. The buyer was in no position to reject the hops by reason of the quantity.” (p. 425)

3. *Appellant's Cases.* Appellant's four-fold classification of the “patterns of interpretation” (App. Br. pp. 27-32) is not Williston's, as suggested (App. Br. p. 27), but its own. Williston classifies those cases which take note of possible “disproportionate burdens” cast upon the output buyer if the output seller is left *entirely* free to operate or not as follows:

1 *Williston on Contracts*, Rev. Ed. 353, § 104 A

“In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party, *but recognizes that either party may in good faith cease to have such output or requirements.*” (emphasis supplied)

The cases Williston contrasts with these cases are those which do not require even good faith on the part of the output seller.

Appellees have no objection to new analyses and classifications of the authorities; however, they are unable to grasp the distinctions which appellant draws. For instance, it is not apparent whether appellant has drawn the patterns according to (1) the factual differences in the cases or contracts involved, (2) the legal theories announced by the respective opinions cited, or (3) the issues actually before the court. Likewise, it is difficult to understand why the rules of those four patterns of cases "do not apply to this case" (App. Br. p. 27) if the present case "falls within the fourth pattern" (App. Br. p. 31).

Apparently, appellant does not rely upon the cases which it classifies in the "third pattern," and for good reason. In the first three cases cited in that group (App. Br. p. 29) the issue actually before the courts was whether the contracts lacked mutuality and the courts apparently felt impelled to suggest that there was some duty to have output or requirements in order to uphold the contracts. Such construction is unnecessary to effectuate that purpose. 3 *Corbin on Contracts*, 204-205, § 569.

Further, nothing in any of these "third pattern" cases indicates that there is liability for ceasing operations if the output seller is financially unable to continue. The reason for the sale of the steamers involved in *Wells v. Alexander* (1891) 130 N.Y. 642, 29 N.E. 142, (cited App. Br., p. 29) does not appear; subsequent cases applying New York law have distinguished the case, isolated it as an "exceptional case" or refused to follow it. See *William C. Atwater & Co., Inc. v. Terminal Coal Corporation* (D.C. Mass. 1940) 32 F. Supp. 178, affirmed (CCA 1, 1940) 115 F (2d) 887 (supra page 17), and New York cases therein cited; and *Duboff v. Matam Corporation* (1947) 272 App. Div. 502, 71 NYS (2d) 134 (supra, page 17). The jury instruction passed upon in *Hickey v. O'Brien* (1900) 23 Mich. 611, 82 N.W. 241 (cited App. Br., p. 29), was definitely contrary to the good faith test for it will be conceded that a sale of the plant "for the sole purpose of getting rid of" (82 N.W. 242) an output or requirements contract constitutes bad faith.

The underlying fallacy of these decisions, however, was demonstrated by the District Court's opinion in the *United Cigar Stores* case (supra, page 12):

"There is another consideration. No case, so far as I know, has gone so far as to hold that the buyer is liable in case his requirements slump off in the course of the contract to one-half, one-third, or one-

tenth of his former needs; and yet, if he is not liable in such a case, it is hard to see how he can be held liable where in good faith he ceases business altogether and thereafter has no requirements." (8 F. Supp. 245)

Finally, these "third pattern" cases, in their efforts to give effect to what they believe to have been the expectations of the parties, construe the agreement of the parties to require a *continuance* of existing needs or production and measure the duty assumed by the accustomed output or requirements *at the time of making the contract*. Such standard can have no meaning, however, in a case like the present one where the output seller had had no prior or "accustomed" output at the time of the execution of the contract.

Appellant asserts that its "fourth-pattern" cases differ from "ordinary" cases and, choosing two cases to so classify, seeks to apply their results to this case and thereby to extricate it from the principles above discussed. These two cases will be considered seriatim.

1. *Diamond Alkali Co. v. P. C. Tomson Co.* (CCA 3, 1929) 35 F (2d) 117, (cited App. Br. p. 30) is neither extraordinary nor comparable to this case. In the first place it will be noted that the authorities on which the *Diamond Alkali* case relies are the "third pattern" cases classified by appellant as "ordinary." As in all the other

cases finding an implied promise to continue operations, the court discerned an intention of the parties that the buyer's requirements would *continue* to be as great as in its *already existing business*. As pointed out above, this is meaningless to a new concern without an established output or requirements. Appellant emphasizes that, as in the present case, the contract was to "continue" for a definite period. Again, such provision hardly makes the case unique. Every case cited thus far under this heading has involved that factor.

In the second place, in a subsequent third circuit case, *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corporation* (CCA 3, 1942) 130 F (2d) 471, 473, *Diamond Alkali* was rejected in favor of Pennsylvania cases (applicable local law) adopting the good faith test.

In the third place, the *Diamond Alkali* case actually involved bad faith and the court was quite cognizant of that fact. The defendant there did not cease to have requirements because of inability to continue but because "an unexpected opportunity to make 'an advantageous sale' presented itself" (35 F (2d) 119) in the form of an offer from the Ford Company. Sutherlin, on the other hand, as will be shown hereinafter, had no other alternative than to discontinue production (Finding XXIII, R. 60), and eventually negotiated a

sale at 3.3 per cent down and the balance at no interest (See Ex. 123) to a low capitalized purchaser. This can hardly be called an "unexpected opportunity" or an "advantageous sale." Further, the Tomson Company in the *Diamond Alkali* case retained a newly built plant, without any productive use being made of it, apparently for the sole reason that in the sale of *part* of its assets it sold its *good will*, coupled with an *agreement not to engage in business* for the term of the contract. Such is not the case with Sutherlin. Presumably if it could operate, it would be bound today to sell 80 per cent of its plywood output to appellant.

2. *Texas Industries v. Brown* (CA 5, 1955) 218 F (2d) 510 (cited App. Br. p. 34) not only is not authority for appellant's position but also illustrates what may so easily be provided in a contract of this type if it is thought desirable to control the disposal of the seller's facilities.

In the *Texas Industries* case, decided on motion for summary judgment, it was alleged that the requirements buyers and those who took over the buyers' operations "deliberately arranged the transfer of the plants, pursuant to a scheme to deprive the appellant of its benefits"—a charge of bad faith. (The similar charge of appellant in this case, as found by the trial court and as will be shown below, is not supported by

the evidence.) No financial difficulties were involved and credence was given to the charge of bad faith by the following facts:

“The plants have not been sold; they have not been shut down; they have not been dismantled; they have never ceased to operate and to have requirements. They are operating under a lease from the Browns, who signed the contract and who are still very much interested as individuals in the operation of the plants. Much of the value of the rights reserved to the lessor under the lease depends upon the continuing operation of the plants.” (218 F (2d) 512) (emphasis supplied)

Sutherlin and Nordic have no organizational relationship (Finding XIX, R. 59) and the sale was at no interest.

Most important the contract in *Texas Industries* expressly provided:

*“13. Nothing in this agreement contained shall prevent any party hereto from consolidating or merging its operation into another operation, or from changing the form of organization, or from selling, conveying, or exchanging its property as an entirety or substantially as an entirety, but any and all such mergers, consolidations, organizational changes, sales, conveyances, or exchanges shall be binding upon the organization resulting from or succeeding to the ownership of the property as an entirety or substantially as an entirety, * * *.”* (218 F (2d) 513) (Emphasis supplied)

The court cited *Portland Gasoline Co. v. Superior Marketing Co.* (1951) 150 Tex. 533, 243 S.W. (2d) 823, as indicating that under Texas law there was an implied obligation to operate. However, in that case the court so indicated only for the purpose of upholding the contract as not illusory and did not reject the good faith test. Further, that case involved an exclusive marketing contract such as that in the *Williams S. Gray & Co.* case (supra, page 16) which this court decided and in which the good faith test was adopted.

It may be conceded that a strong motive impelling a court to prevent the disposition by a seller (for collusive, capricious or speculative reasons) of the assets with which it has been producing its output, is the fear that otherwise disproportionate burdens will be cast upon the output buyer. However, contrary to appellant's contention, the present case tends entirely in the opposite direction. As pointed out in appellees' statement of the case (supra, page 4), the sole consideration for Sutherlin's obligation was the loan of money from appellant's parent corporation. The promise to "advance" a portion of the price of plywood *purchased by appellant* upon receipt of invoice and bill of lading (inappropriately designated in Appellant's Brief (p. 2) as "accounts receivable financing") is wholly illusory be-

cause such "advances" depended entirely on appellant's orders which it was not bound to give.

Ward v. McKinley (1920) 97 Or. 45, 191 Pac. 322

Inasmuch as appellant was free to purchase, and did purchase output of others, the "best effort" provision furnishes no conceivable standard of performance. Hence, it is too uncertain to be enforceable.

First Natl. Bank v. Hazelwood Co. (1917) 85 Or. 403, 166 Pac. 955

Barton v. Spinning (1894) 8 Wash. 458, 36 Pac. 439

Oregon Plywood Corporation's \$80,000 loan, at 4 per cent interest, was fully and adequately secured by a first mortgage on Sutherlin's mill (Exs. 114, 115). Its advances for veneer, although aggregating approximately \$216,000 during Sutherlin's operations, were necessarily short term advances which were doubly secured: (a) by the retention of security title to the veneer (Ex. 2); and (b) by the provisions of the sales contract and loan agreement (Exs. 1, 2) authorizing appellant to pay the veneer advances by applying thereto its 80 per cent "advance" on receipt of invoice and bill of lading, as well as the balance of the invoice price. In fact, this left little of the "Oregon Plywood" interests' money in the hands of Sutherlin. (See for the

workings of these provisions R. 150, 157-158 and compare "accounts receivable, brokers" and "accounts payable, brokers" in Sutherlin's monthly balance sheets, Ex. 131-C to 131-G).

Nevertheless for these two loans of money appellant obtained effective control over Sutherlin's operations so long as Sutherlin could stay in business. It could sell 80 per cent of its output to no one but appellant, but appellant could take that output or not according to its desires. It was not upon appellant but upon Sutherlin that disproportionate burdens were cast.

In any event, appellant's commitments hardly take the case out of the general rules governing these contracts. The *Pfann* case (supra, page 14) involved a loan by the buyer to the output seller. In the *United Cigar Stores* case (supra, page 12), contrary to appellant's assertion (App. Br. pp. 30-31), in addition to the promise to sell the buyer's requirements, the claimant-seller had agreed to sell 15,000 shares of its stock at more than \$290,000 below its existing selling price on the stock exchange. So also, in the *Fort Wayne Corrugated Paper* case (supra, page 17) the requirements seller had not only advanced money but had leased a plant from the requirements buyer, expanded its plant and refrained from dealing with others.

Again, if (as appellant contends) the basis of the decisions in *Diamond Alkali* and *Texas Industries* was the degree of reliance placed by one of the parties upon the expected continued production, the present case fails to reach them. There are obvious and basic differences between the loans made here and the sale of land and enlarging of a plant in *Diamond Alkali* and the building of a new plant in *Texas Industries*, especially in the absence here of a duty to buy Sutherlin's production.

Professor Corbin has analyzed the problem with his customary insight. Referring to output and requirements contracts and the "gap" as to whether continuous operations were guaranteed, he states:

"In both of these classes of cases the courts have generally answered the questions in the negative. They leave the gap unfilled; no such promises are implied. * * *

"If it were necessary to make such an implication in order to maintain the validity and enforceability of the agreement, it should be made; but it is not necessary for that purpose. If it were necessary in order that the contract should not be unreasonable or unfair to one of the parties (the seller) according to prevailing standards and usage, the implication should be made; but it is not necessary for that purpose. If such agreements, in spite of the unfilled gap, were commonly so understood and performed by business men, the additional unstated duty and burden should be put upon the buyer

by implication; but no such understanding or performance can as yet be shown.

“Here, then, is a gap that should not be filled by the court. The implication suggested might not be unreasonable—at least the added promise is one that men sometimes make in words; but refusal to make the implication does not make the contract unenforceable, unreasonable or one-sided. The seller may be quite willing to trust to the self-interest of the buyer, to his desire to continue a profitable business, and to his promise to buy exclusively of the seller, without any further promise on the buyer’s part. The risk of there being no needs or requirements the seller may be quite willing to carry; and he can adjust his prices in proportion to the risk.

“Only the least thought is necessary to realize that a ‘gap’ in an agreement should not be filled merely because a gap exists. No promise, or condition of a promise, should be added by either implication or judicial construction, merely because the parties did not put it into their words of agreement.”
3 Corbin on Contracts 204-205, § 569

**B. Sutherlin did not Promise, Expressly or Impliedly,
that it would Continue to have an Output.**

The contention that this contract “expressly requires” continuous operations differs from the arguments made in most of the cases above cited only in the label attached to it. The construction advanced still requires one to read into the contract a provision which is not there.

1. *The "full force and effect" provision.* The provision that "this contract shall be in full force and effect" for a definite period is not unlike that in every case hereinbefore cited. It is remarkably similar to that in *William S. Gray & Co. v. Western Borax Co.* (CCA 9, 1938) 99 F (2d) 239 (supra, page 16). If they did not have a definite term, these contracts would be void for lack of certainty, and if the termination of production or sale of plant had not occurred during the time the "contract" was "in full force and effect" there would have been no law suits. The question raised here is not how long the contract is "in full force and effect" or whether Sutherlin was obligated to a "standard of performance," but rather what that standard of performance is in a contract that admittedly is still in effect. *In re United Cigar Stores Co. of America* (D.C. N.Y., 1934) 8 F. Supp. 243, (supra, page 12).

2. *The mortgage term and casualty provisions.* Appellees readily agree that the term of the mortgage and term of the contract were intended to be the same and that this was to be so regardless of whether Sutherlin operated or not and even if the inability to operate was because of "fire, earthquake, disaster or act of God."

Appellees cannot agree, however, that because the "contract" was to "continue in full force" in those

events it is proper to infer that "temporary inability to produce was not to relieve Sutherlin from the duty to *continue in operation*" (App. Br. p. 21; emphasis supplied). The thing that appellant continues to ignore is that there is a difference between *performing* an output contract, that is, selling what the output is, and *continuing to operate*. In fact, the provisions referred to illustrate that difference. They show that the parties understood that Sutherlin could be "unable to produce" and yet the contract could "continue in full force."

As shown above, page 29, Sutherlin's need for working capital led it to subject itself substantially to the will of appellant, but it is inconceivable that in its position its officers would have taken from it a defense even for "acts of God." As stated by this court in the *William S. Gray & Co. case* (supra, page 16):

"Appellant's contention in effect is that appellee not only must retain ownership of the borax properties but that it must continue to 'produce' from them to yield a profitable commission to appellant no matter what losses appellee may suffer from the failure of appellant, its exclusive agent, to procure sales yielding a profit to the appellee. * * *

"It is against business common sense that the parties would make an agreement to continue production or remain in the business in these circumstances." 99 F (2d) 242

It is also unlikely that appellant or its representative, Robert F. Hofheins, believed that any such duty was assumed by Sutherlin. As found by the trial court (Finding VIII, R. 53) they had had extensive experience in the plywood industry and knew of Sutherlin's weakness and the possibility it could not continue to operate. The provisions of the contracts themselves show that both parties were aware of these facts. Further support for this finding's recognition of appellant's knowledge of the situation and Sutherlin's weakness, comes from the evidence that Mr. Hofheins had entered into other output contracts (R. 107) and was shown the financial statements of Sutherlin as of October 31, 1953 (Ex 131-A; R. 203).

Further, the obvious motive for and objective of these provisions was not to require continuous operations but to protect and enhance the "Oregon Plywood" investments. Under the contract appellant was to receive a 5 per cent discount off the wholesale jobber's market price—5 per cent lower than any other buyer—in return only for the loan of money (by its parent corporation). This is a remarkably high return on \$80,000 in loans (at 4 per cent interest) and short term veneer advances. As shown by Exhibit 146 it amounted to \$13,413.81 in three and one-half months (see R. 185). With the knowledge that money to make the mortgage pay-

ments must come from operations and sales to appellant (the payments were to be deferred if insufficient orders were furnished), the "Oregon Plywood" interests simply insured by these provisions that so long as their money was invested they would receive the extra 5 per cent discount on the output of Southerlin.

3. *The accept and ship provision.* Appellant also points to the provision that Sutherlin would accept and ship appellant's orders. The full provision in question is that Sutherlin (First Party) grants to appellant (Second Party)

"* * * the right to purchase up to 80% of the output of Party of the First Part when Party of the First Part gets into production, and Party of the First Part agrees to accept up to 80% and ship Party of the Second Part's orders as specified and within a reasonable time." (Ex. 1)

What orders was Sutherlin to accept and ship? Up to 80 per cent of what? Appellant's Brief is significantly silent on that point. Although this provision was not as artfully drawn as it might have been, it seems clear that they were orders for the same 80 per cent already mentioned, namely, 80 per cent of *output*. The case of *Kanaskat Lumber & Shingle Co. v. Cascade Timber Co.* (1914) 80 Wash. 561, 142 Pac. 15, involved a contract with a similar provision. The seller agreed "to furnish to the party of the second part all the cedar logs cut

by it" in a certain area, and further agreed "to cut cedar logs as they are reached in the logging operations * * * and to deliver the logs cut." It was held that seller's duty was to sell only such logs as were actually cut, *if any*.

We have searched appellant's brief for an indication of just how much continuous output Sutherlin is supposed to have promised and the measure of its supposed duty to appellant. The only indication is found in its asserted measure of damages—that is, that it is entitled to damages of 5 per cent of the price of orders which the mill "could have handled" (App. Br., pp. 49-50), less expenses. In other words, the contention is that this is not an 80 per cent-of-*output* contract, but an 80 per cent-of-*capacity* contract. The immediate question is: If the parties meant "capacity" why did they say "output"? The answer is that they didn't intend it and had intentionally chosen the term output. In fact, the loan agreement, which was executed at the same time as the sales contract (Findings III and IV, R. 25-26; R. 79), shows that the parties had specifically considered the possibility that Sutherlin would not operate and would not accept orders for 80 per cent of its *capacity*, and, also, what was considered an ample remedy therefor to the "Oregon Plywood" interests. It provided:

“In the event that Party of the Second Part [Sutherlin] does not operate for a period of ninety (90) days and/or does not accept orders up to 80% of *capacity* from Oregon Plywood Sales Corporation for reasonable prompt shipment * * *, then any unpaid balance due Party of the First Part [Oregon Plywood Corporation] may become due and payable within sixty (60) days at Party of the First Part’s option, * * *.” (Ex. 2); (emphasis supplied).

These were formal, lawyer-drawn documents. By elementary rules of construction, the parties must be held to have intended that the remedy of acceleration of the mortgage was an exclusive one for the failure to operate at all or at capacity.

Finally, it is quite apparent that appellant intentionally sought to provide for the contingency of failure to operate by means much more subtle than a direct provision requiring continuous operations. Through the provisions (a) for representation on Sutherlin’s board of directors, and (b) for acceleration of the mortgage, it could do considerable to control the production policies of Sutherlin. This control was to be *indirect* only. It is unlikely that Sutherlin would have acceded to the more pervasive direct restraint on its normal corporate rights.

C. Appellant made no Showing of Bad Faith and the Evidence Supports the Finding of Good Faith.

(See Specifications of Error Nos. II, III, IV, V, VI, XII and XIV)

1. *The test.* Appellant complains that Sutherlin could have operated because it still had an excess of assets over liabilities (excluding capital stock) and because the plywood market improved in the summer of 1954 and remained firm until the time of trial. Aside from the finding, amply supported by evidence to be cited hereinafter, that Sutherlin had become unable to continue production (Finding XXII; R. 59), appellant misses the point. The test is not whether operations were possible, or even whether reasonable men would have continued them, but rather it is whether the decisions not to continue and to sell were made in good faith. To find bad faith the decisions must have been for the sole purpose of depriving the buyer of the benefits of the contract. As to this, the buyer asserting the breach of an output contract has the burden of proof. Decisions made in the exercise of *honest* business judgment do not constitute bad faith.

William S. Gray & Co. v. Western Borax Co. (supra, page 16, at 99 F (2d) 242)

In re United Cigar Stores Co. of America (supra, page 12, at 8 F. Supp. 244, 245, and at 72 F (2d) 675)

William C. Atwater & Co., Inc., v. Terminal Coal Corporation (supra, page 17, at 32 F Supp. 183 and at 115 F (2d) 888)

Southwest Natural Gas Co. v. Oklahoma Portland Cement Co. (supra, page 17, at 102 F (2d) 633)

Kenan, McKay & Spier v. Yorkville Cotton Oil Co. (supra, page 18, at 96 S.E. 526)

There is no evidence that the decisions to terminate production and sell the mill were not the result of honest business judgment.

2. *The facts.* Regardless of whether appellant had the burden of showing bad faith or appellees were required to show good faith, the finding of good faith is amply supported by the evidence. Sutherlin's plight has been summarized in Appellees' Statement of the Case (supra, page 5). A few of the particulars will be listed here:

(a) From the beginning Sutherlin was weak financially. The balance sheet of October 31, 1953, (Ex. 131-A), lists a surplus of \$332.69; however, included in the list of assets is the item "organizational expense" in the amount of \$19,452.26. By deducting this item, which is not a genuine asset, it is seen that Sutherlin's capital was actually impaired on that date by a deficit exceeding \$19,000 (Finding XIII, R. 56). This balance sheet was shown to Robert F. Hofheins, treasurer for

both appellant and Oregon Plywood Corporation prior to the execution of the contracts here involved (R. 53, 203).

(b) More important than the fact that its capital was at all times impaired was its *poor current position*. As shown by its balance sheet of that date (Ex. 131-A) on October 31, 1953, it had \$44,662.46 in current assets, including \$15,207.22 cash and \$21,676.27 in stock subscriptions receivable.

(c) By December 31, 1953, after receiving \$50,000 of the long-term loan provided for in the loan agreement (Exs. 2, 114) its current position was improved to \$95,269.48 current assets, including \$49,322.34 cash, and \$95,870.38 current liabilities (Ex. 131-B).

(d) By January 31, 1954, after a month of operation, its current position had declined to \$130,464.44 current assets—including \$32,185.82 cash, and \$151,848.29 current liabilities—including \$54,333.27 owed to Oregon Plywood Corporation for veneers (Ex. 131-C; supporting data in Ex. 132-B). As shown by the Income Account for January, 1954, (Ex. 131-C), losses for that month totaled \$22,337.50 and had averaged \$28.01 per thousand board feet of plywood produced.

(e) The pattern continued and worsened. Finding X (R. 54-55), based upon the monthly balance sheets

and income statements (Exs. 131-C to 131-G), and supporting records (Exs. 132-A and 132-B), summarizes Sutherlin's losses as follows:

MONTH (1954)	Net Losses
January	\$22,604.99
February	46,380.69
March	29,624.62
April	18,131.51
May	9,224.91
Total net losses	<u>\$125,966.72</u>

On February 28, 1954, its cash account was overdrawn by \$18.27 and its accrued payroll was \$11,792.57 (Ex. 131-D). On March 31, 1954, the overdraw was \$3,-801.72 and its accrued payroll was \$10,890.97. Its current position was \$53,117.59 current assets and \$127,-323.70 current liabilities (Ex. 131-E). At this point appellant advanced an extra \$11,000 for Sutherlin to meet its payroll secured by an assignment of current accounts receivable (Ex. 117; R. 176-177), but on April 30, 1954, when much of the normal expenses had stopped nine days previously, the cash account was only \$169.41 and its current liabilities still exceeded its current assets by almost 100 per cent (Ex. 131-F). A month later after settling most of its accounts with appellant and Oregon Plywood Corporation and making two overdue payments on the mortgage (Finding

XXIX, R. 62) it still had only \$409.15 cash and its current position turned out to be even worse. (Ex. 131-G).

Thus, after going through \$91,000 in loans from the “Oregon Plywood” interests, collecting most of the collectible stock subscriptions (compare Ex 131-A and 131-G; R. 245) it had lost \$125,966.72 — about one-fourth of its capital — in the course of only a few months. Its current account with appellant and Oregon Plywood Corporation was a virtual stand-off. Although its other accounts receivable were \$8,147.54 it owed \$45,117.66 to the trade and \$12,772.93 in payroll taxes. The installments payable on the mortgage were \$1,000 per month and within the next twelve months it would be required to pay \$41,771.05 on installment sales contracts for its equipment (Ex. 131-G). It had no money to pay its \$27,000 per month payroll (R. 178, 184), its insurance premiums (R. 178), glue for operations (R. 143, 180) the night watchman’s wages (R. 193) or the electrical power to operate the machinery (R. 226).

Aside from the fact that it was in default on the mortgage, that installment sales contract creditors and other creditors were demanding payment (Ex. 137; R. 179) and that the federal government was demanding payment of the withholding taxes, it had twice been

threatened with labor liens for failure to meet its payroll and its electrical power had been shutoff (R. 178, 192). The creditors as a group began to take a hand in the matter at the meeting of June 11, 1954, pursuant to Sutherlin's invitation (Ex. 134-D; R. 197).

In short, Sutherlin's working capital was exhausted; it was broke; bankruptcy was feared (R. 219). Within the accepted definition of the term in equity courts it was insolvent because it could not pay its obligations in the regular course of business as they matured (Finding XIII, R. 56, Conclusion VII, R. 65).

21 Words and Phrases 624-630

Robert F. Hofheins, appellant's representative on Sutherlin's board of directors, agreed that the resolution of July 28, 1954 (Finding XVII, R. 57) authorizing sale or lease of the mill, was the only thing left to do (R. 201), and on the trial counsel for appellant stated:

“Mr. Anderson: I don't doubt but what they were in serious financial difficulty, your Honor.”
(R. 181)

Appellees wish to add that this is *not* a case in which the assets of the corporation were drained off by excessive salaries to controlling executives. The

officers and directors of Sutherlin served entirely without compensation (R. 202).

Various theories were advanced at the trial to explain Sutherlin's failure. Apparently appellant contended it was the fault of Sutherlin's manager. However, there is no evidence that Mr. Hofheins ever suggested a change of manager (R. 182). If it were really important to know, Finding XXII (R. 59) concludes the issue by finding that it was through no fault of Sutherlin. The purchase of too much and too high priced veneer in a declining finished product market was one explanation (R. 184). Inadequate machinery, both as to type and quality, was another (R. 235-239). It is also possible that the inexperience of officers and directors in this field (R. 123, 131, 211) contributed to the losses and that some test for employment other than holding stock in the corporation would have aided the situation (Finding X, R. 55). However, the question is not whether Sutherlin could have done better but rather whether it did what it did in good faith.

The efforts to reopen the mill by obtaining additional financing both from banks and other organizations were many, but need not be detailed here except by citations to the record (See R. 127-128, 179, 192, 193, 226, 227). Appellant suggests that when the mar-

ket improved in the summer of 1954, as a result of the strike in the industry, it would have been a simple matter to reopen. Aside from the fact that neither it nor Robert Hofheins offered a plan for obtaining veneer with the industry on strike or offered a plan for financing (R. 226), there is no evidence that reasonable men would have foreseen the continued firm plywood market for any definite period. Further, Sutherlin's operations to date had shown an average loss per thousand board feet of plywood produced of \$30.06 (Ex. 131-F). Based on an increase in the market price from \$76 to \$90 (R. 88) and even assuming that veneer prices were no higher than during Sutherlin's operations (an unlikely possibility), the best that Sutherlin could have expected was continued losses of over \$16 per thousand board feet purchased. It is little wonder that the bankers were pessimistic as to Sutherlin's chances (R. 192).

Appellant's contention, then, is that Sutherlin was bound to produce at capacity for 60 months at a loss of at least \$24,000 per month ($\$16/M \times 1,500,000$ feet) so that appellant could make a profit of \$4,000 per month (App. Br. p. 50) — and this without being obligated to purchase anything and in return for nothing but the loan of money. We are confident that such result cannot be reached in a court of equity.

The foregoing summary demonstrates the correctness of the trial court's findings (Finding XXIII, R. 59-60) that in ceasing operations and selling the mill Sutherlin acted in good faith and, in fact, had no alternative but to do so or face continued additional losses and, ultimately, bankruptcy.

Appellant cannot prove its case, let alone upset the findings of the trial court, by Nordic's experiences. Sutherlin and Nordic are completely separate and different organizations. Nordic's financial statements (Ex. 133) show that its cash was never depleted as was Sutherlin's. Although it started in a rather poor current position, yet, with most of its obligations in one long-term non-interest bearing and flexible obligation to Sutherlin for the purchase price (Ex. 123), without Sutherlin's embarrassing loss record, and by operating at only a small loss for the first three months, on December 31, 1954, it had achieved (with financial assistance) \$175,628.65 in current assets and \$168,234.92 in current liabilities. In operations, with a very experienced plant manager, it made numerous changes by enlarging, improving, replacing, repairing and adding equipment (R. 234-239). Whereas, Sutherlin's best month, March, 1954, showed production at 1,553,678 board feet, Nordic's production for October, 1954 (second month of operation) was 1,980,377 board feet and

by December, 1954, it had increased to 2,534,493 board feet. It remained at that level thereafter and Nordic began making a profit (P.T.O. XII, R. 28; R. 233).

In short, their methods of operations and financial structures were so different that what Nordic did does not indicate what was or could have been done by Sutherlin.

II. Nordic Did Not Tortiously Interfere With or Induce A Breach of the Contract.

(See Specifications of Error Nos. V, VII, XVII, XVIII, XIX and XX).

A. The Purchase of the Mill did not Induce and Could not have Caused the Breach or any Damages to Appellant.

To have been entitled to relief against Nordic, appellant was required to prove

(1) that there was a breach of contract,

(2) that in the absence of Nordic's purchase of the mill the contract would have been performed by Sutherlin; and

(3) that Nordic, not Sutherlin, was the procuring cause of the breach.

Annotation: 84 ALR, 43-100, "*Liability for procuring breach of contract*," at pp. 51-52; supplemented 26 ALR (2d), 1249-1251

Appellees have already shown that no breach of contract occurred (*supra*, pp. 9-47). Both the findings of the trial court and the evidence in the record negative the two additional matters appellant was required to prove.

First: As shown above, Sutherlin could not continue to operate. Even if it could be assumed that the loss per thousand board feet of plywood produced would have been reduced to an average of \$16 after the industry strike occurred, such fact would neither assist in obtaining additional working capital nor prevent Sutherlin's liabilities, exclusive of capital stock, from quickly exceeding its remaining assets. The trial court found (Finding XXIII, R. 59-60), and this court can take judicial notice of the fact, that a manufacturing corporation can not continue on such basis and that, as found by the trial court (Finding XXII, R. 59), when Nordic first appeared on the scene, Sutherlin had already become disabled from furnishing appellant any output from its mill. Regardless of whether Sutherlin thereby breached some implied obligation to continue production, the fact remains that it was disabled and that Nordic's purchase of the mill had nothing to do with its being disabled. How, then, could Nordic's acts have caused damages to appellant? To have been en-

titled to relief appellant must have proved a causal connection between Nordic's acts and the loss.

Second: The findings of the trial court, unchallenged here, were that Sutherlin's production ended April 21, 1954, that in June, 1954, Sutherlin decided it would sell or lease its mill, if possible, and that from June forward it actively sought to find a possible buyer or lessee of the mill and invited offers therefor (Findings XII, XVI and XVII, R. 56, 57). Thereafter, in response to said invitations for offers, J. R. Adams and Norman H. Jacobson (who later caused Nordic to be incorporated) made an offer to Sutherlin which was accepted by Sutherlin (Findings XVIII and XIX, R. 58-59). The sale occurred after Nordic was incorporated.

These facts show and the trial court found that Nordic did not *induce* Sutherlin's refusal to produce or decision to sell the mill, that there was no tortious conspiracy or collusion between Sutherlin and Nordic, that there could have been no causal connection between Nordic's acts and any breach of contract or damages to appellant and that appellant has failed to prove the contrary (Findings XXVI, XXVII, R. 60-61).

If a party to a contract has already voluntarily withdrawn or determined to withdraw from performance of his contract, others who subsequently deal with such

party so that he can not in any event perform that contract incur no liability for such acts. This is so whether the others know of the prior inconsistent contract or not.

Prosser on Torts (1941) p. 986, § 104

“In order to be held liable for interference with a contract, the defendant must be shown to have caused its nonperformance. It is not enough that he merely has reaped the advantages of the broken contract after the contracting party has withdrawn from it of his own motion. Thus acceptance of an offered bargain is not in itself inducement of the breach of a prior inconsistent contract, although the defendant may be liable if he has taken an active part by holding forth an incentive, such as the offer of a lower price or better terms. It seems probable, although the question does not appear to have arisen, that the mere statement of existing facts in such a way that the party persuaded recognizes them as a reason for breaking the contract is not enough, so long as the defendant creates no added reason by his conduct.”

4 *Restatement of Torts*, § 766, Comment i.

“*Making agreement with knowledge of the breach.* One does not induce another to commit a breach of contract with a third person under the rule stated in this Section when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person (compare Comment h). For instance, B is under contract to sell certain goods to C. He offers to sell them to A, who knows of the contract. A accepts the offer and receives the goods.

A has not induced the breach and is not subject to liability under the rule stated in this Section (compare Restatement of Contracts, Sec. 576).”

The “conspiracy” which results from mere knowledge that the subsequent contract is inconsistent with the prior one, if such it is called, is not a legally tortious one.

A leading case recognizing this principle is

Sweeney v. Smith, (C.C. E.D. Pa., 1909) 167 Fed. 385, affirmed (CCA 3, 1909) 171 Fed. 645, cert. den. (1909) 215 U. S. 600, 54 L. Ed. 343

There, the plaintiff had contracted with a bondholders’ committee to purchase bonds of a street railway at a 60 per cent discount, but the committee had subsequently sold them to the defendant, E. B. Smith & Co. The plaintiff’s bill sought to compel E. B. Smith & Co. to account for the profits from the purchase and sale of the bonds and alleged:

(p. 386) “ ‘The said Edward B. Smith & Co. knew before they entered upon their negotiations of your orator’s contract, * * * and their negotiation with said committee was conducted through one D. L. Groner and one Tazewell Taylor, both of whom knew of your orator’s said contract before they entered upon the said negotiations.’ ”

In sustaining a demurrer to the bill, the court reviewed the authorities and held such knowledge to be insufficient to impose liability.

“Under all the authorities the bill is fatally defective on this point. * * * It must be founded on a tort, on a wrong done by Smith & Co., and must be supported by the proposition that it is an actionable wrong to make a second contract with a promisor if he is known to have had a prior contract upon the same subject with another promisee. In my opinion, this proposition is not sound. The promisor may have excellent reasons for declining to be bound by the earlier contract, and these he need not disclose. If he chooses to take the risk of breaking the first agreement, that is his own affair, which may make him liable on that agreement, but imposes no obligation on the second promisee. * * * Mere knowledge of the first does not make the second an actionable wrong; he is under no legal obligation to insist upon being told why the promisor declines to carry out the first contract, and is not bound to weigh these reasons and decide at his peril whether they are good or bad.

* * *

“* * * Without deciding now between the conflicting views, it is enough to say that no case can be found, I think, in which the action has been sustained unless the interference has been wrongful in a legal sense. At the least, the interferer must have induced or persuaded the breach complained of. If he accomplish his purpose by fraud in any of its forms (as was the case in *Angle v. Railroad*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55), his liability is undoubted; but I have been referred to no decision, and I have found none, in which mere knowledge of the earlier contract was held to be the equivalent of inducement or persuasion or (still less) of fraudulent conduct.”

To the same effect are

Ford v. Wilson & Co., (CCA 2, 1942) 129 F. (2d) 614, 617

Horth v. American Aggregates Corporation, (Ohio App., 1940), 35 N.E. (2d) 592, 598

B. J. Wolf & Sons v. New Orleans Tailor-Made Pants Co., (1904) 113 La. 388, 37 So. 2

In fact, there is even serious doubt whether a state can constitutionally impose liability on a third party merely on the grounds that it knew of a prior contract which could not be performed if property were purchased. Vicarious liability for the purchase of unencumbered property can not be extended to such extreme.

Minnesota Wheat Growers' Co-op Marketing Ass'n v. Radke, (1925) 163 Minn. 403, 204 N.W. 314

In that case a co-operative marketing statute imposed a penalty and liability to the co-operative on any dealer, prospective purchaser or other person conducting a warehouse who (P. 314)

“ * * * solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's product for sale * * * . ”

The court held that, as applied to one who did not induce the withdrawal from the co-operative by the

members of the co-operative but merely contracted to purchase the members' products with knowledge that said members had contracted to market them through the co-operative, the statute was unconstitutional (P. 315).

"Of course, it is well settled that a malicious interference by one not a party to a contract to induce its breach is a tort for which redress may be had. *Canellos v. Zotalis*, 145 Minn. 292, 177 N. W. 133; *Bacon v. St. Paul Union Stockyards Co.* (Minn.) 201 N. W. 326. But section 27 does not stop with those who maliciously interfere with existing contracts between third parties. It makes it an actionable wrong for one who has used no effort, or held out no inducement for a member of a co-operative market association to breach his contract with the association, except this, that he is ready at his usual place of business to buy or handle products that such member may voluntarily bring there for sale or disposal, the same as for an outsider. * * *

"* * * an outsider brings to the latter's place of business for sale or disposal a commodity which is under contract for delivery to his association, he has breached his contract with it, and must be held to have so breached it voluntarily.

"It seems clear to us that it is beyond the power of the Legislature to make it a tort to purchase, in the ordinary course of a legitimate business, from the true owner a wholesome staple commodity upon which there is no lien and which is not under any ban or regulation because of inherent qualities or use."

A similar statute was upheld as constitutional by the Wisconsin court in

Northern Wisconsin Co-op Tobacco Pool v. Bekkedal, (1923) 182 Wis. 571, 197 N. W. 936

as applied to malicious activities, and an injunction against them was upheld. However, on rehearing, the court modified the decree and held

(P. 946) "If a member should voluntarily sever his relations with the pool, by breaching his contract, and withdrawing his membership therein, and placing his tobacco for sale upon the market, no reason is perceived why appellants should be denied the privilege of buying his crop. To that extent and for that purpose the injunctive order or judgment is amended, * * *."

It will be noted that appellant makes no contention that there was any equitable lien or servitude that ran with the mill property. If it did, the contention would fail.

First Nat. Bank v. Hazelwood Co., (1917) 85 Or. 403, 166 Pac. 955

In summary, appellant's proposition that Nordic's purchase of the mill could legally have been the inducement of a breach of a completely collateral contract concerning the "output" of the owner of the mill, where there was no promise not to sell or assign, is novel, to

say the least. No case has been found imposing liability therefor. The case is unlike *Texas Industries v. Brown*, (CA 5, 1955) 218 F. (2d) 510 (cited App. Br. p. 34) and *McKenney v. Buffelen Manufacturing Co.*, (CA 9, 1956) 232 F. (2d) 5, in that in both cases the contract contained express provisions covering the transfer of assets. Even assuming, however, that liability is possible in such case, Nordic's acts were not legally tortious as to appellant in this case because

(1) It failed to prove that Sutherlin could have furnished it with any further production and the trial court found that it could not have done so.

(2) It failed to prove that Nordic's acts induced or caused the closure or sale of the mill and the trial court found that Sutherlin was the moving party.

B. Nordic Was Privileged to Purchase the Mill.

As noted above, any inducement of breach of contract resulting from the purchase of property used in the performance of a contract, not accompanied by an agreement that the seller will not produce with other assets, is extremely incidental to the buyer's conduct.

The trial court found that Nordic purchased the mill in good faith, for its own purposes and without any purpose of injuring appellant (Finding XXVII, R. 61). It concluded that Nordic was privileged to purchase the mill (Conclusion IX, R. 65). Evidence supporting this

finding includes the fact that prior to the purchase its incorporators obtained and relied upon legal opinions that it would not be interfering with any legal rights of appellant (Ex. 136, R. 230), the fact that its incorporators invested a substantial sum of money to effect the purchase (R. 231, 238), and the fact that Sutherlin had become disabled from producing further (Finding XXII, R. 59).

When the breach is merely incidental to a defendant's conduct there is no liability, provided

(1) That the defendant has used no means which are tortious in and of themselves as to some person, and

(2) That the defendant has sought only to advance his own legitimate economic interests, and has not acted with the primary purpose of inducing the breach or injuring the plaintiff.

Some cases apparently have proceeded on the theory that there is no *prima facie* tort in such case, whereas others have deemed the situation one of privilege.

Prosser on Torts (1941) 994-996, Sec. 104

4 *Restatement of Torts*, § 766, Comment d

cf. *DeMarais v. Stricker* (1936) 152 Or. 362, 53 P. (2d) 715

Even when the means are “wrongful” in the sense that they involve a breach of a contract by the defendant, there is no liability for such incidental interference.

R. J. Caldwell Co. v. Fisk Rubber Co., (CCA 1, 1933) 62 F. (2d) 475, 477

The plaintiff in that case sought to recover lost sales commissions because the defendant intentionally breached its contract with the plaintiff’s manufacturer. In affirming a directed verdict in favor of the defendant, the court stated:

“There is no evidence, and no contention, that in taking that step Fisk acted under any other motive or purpose than the protection of its own interests. Apparently, its managers decided they would rather break the contract and pay the damages, than go on with the large deliveries which it was obligated to take—a situation by no means unprecedented.

“The fact that Caldwell’s interests would be adversely affected by the Fisk Company’s breach of its contract, and that this fact was known to the Fisk Company, did not render the Fisk Company liable to Caldwell.”

To the same effect are

New York Trust Co. v. Island Oil & Transport Corporation, (CCA 2, 1929) 34 F(2d) 649, 652, cert. den. (1930) 281 U.S. 724, 74 L. Ed. 1142 (mortgagee has no independent rights for defendant’s breach of contract with mortgagor)

Dewey v. Kaplan, (1937) 200 Minn. 289, 274 N.W. 161 (third party’s competition in violation of pro-

vision in lease gives no rights to lessor whose lessee rescinds therefor)

Kokomo Rubber Co. v. Anderson, (1924) 33 Ga. App. 241, 125 S.E. 783 (lessor has no action against hold-over tenant whereby lessee for subsequent period rescinds)

The mere purchase of property known to be necessary if the seller is to perform his contract with a third party has never, so far as we have found, subjected the purchaser to liability if he acted only in the furtherance of his own legitimate interests and had no purpose to injure the third party. The ramifications of a contrary rule would be virtually limitless.

III. In Any Event, the Relief Requested Is Neither Appropriate Nor Supported by the Evidence.

(See Specifications of Error Nos. XVII, XVIII, XIX and XX.)

The trial court made no findings with respect to the amount or measure of damages or the facts determining the appropriateness of equitable relief. Even if it were possible to make such findings from the present record, it is not the function of this court to do so.

Deering-Milliken & Co. v. Modern-Aire of Hollywood, (CA 9, 1955), 231 F. (2d) 623, 627

Nevertheless, we will show that, in any event, appellant would not be entitled to more than nominal damages or to injunctive relief.

A. The Damages, If Any, Cannot Be Measured With Reasonable Certainty.

It is only in its section on the measure of damages (App. Br. pp. 48-51) that appellant suggests exactly what "output" was supposed to mean, and that suggestion is that it was to be what the mill "could have handled" (App. Br. p. 49). It is quite obvious that the parties would have used the term "capacity" instead of "output" if such had been intended. In any event, appellant has cited no case which has set a measure of damages for the breach of either an output or requirements contract *where the person suing is the output buyer or the requirements seller*. In fact, it has cited no case in which damages were actually awarded to such plaintiff.

Even cases such as *Wells v. Alexandre*, (1891) 130 N.Y. 642, 29 N.E. 142 (cited App. Br. p. 29) provide no measure of damages for the present case because they measure the required production by that at the time the contract was made, whereas here there had been nothing produced at or prior to the making of the contract.

Only damages which can be estimated with reasonable certainty are recoverable. It cannot be foretold with such certainty that a new business will continue at any particular level of productivity or at all. See 5 *Corbin on Contracts*, § 1023, n. 96. Here there is no certainty that Sutherlin could have continued to have an output for appellant to sell at a profit, and the trial court found that it had become disabled from doing so (Finding XXII, R. 59). This fact negatives the recovery of more than nominal damages from Sutherlin if the word "output" is given its natural meaning. In any event, it prevents recovery from Nordic. If Sutherlin could not have produced, *at capacity or otherwise*, it cannot be said that in the absence of Nordic's purchase of the mill appellant would have had any plywood production on which to make its 5 per cent commission.

B. Injunctive Relief Is Inappropriate and Is Barred by Appellant's Conduct.

As the trial court found (Findings XVI, XVII, XVIII, XXVI, XXVII, R. 57-58, 60-61) and as shown above (see pp. 47-59), Nordic's purchase of the mill was not tortious. Hence, there is no wrong to be enjoined.

In any event, such relief would be peculiarly inappropriate and harsh here. Appellant's contract was with

Sutherlin, not with Nordic. When it contracted with Sutherlin with full knowledge of its lack of working capital, it took its chances that Sutherlin would fail (Finding VIII, R. 53; R. 72, 203).

The many differences between Sutherlin and Nordic in management, method of operation, equipment and financial structure have been shown above (see pp. 46-47). Appellant should not now be entitled to invoke its prerogatives upon a completely different organization, not connected with the first, and thereby receive a windfall. It has cited no case which would support such relief, and such would be contrary to the basic principles of equity. In fact, the case most relied upon by appellant, *Diamond Alkali Co. v. P. C. Thomson & Co., Inc.*, (CCA 3, 1929) 35 F. (2d) 117, 120, recognized that such could not be done.

Further, appellant's conduct bars its resort to equity for such relief. The record shows that Robert F. Hofheins (appellant's representative on Sutherlin's board of directors) did nothing to improve the management of which it complains or to assist in reopening the mill after it was compelled to shut down, and he was often absent from meetings of the board (see Finding XV, R. 57; Exs. 134C, 134D, 134H, 139, 140 and 129F; and R. 191, 197, 198, 202, 212, 216-217, 221, 224 and 226). Further, he made no protest to the orders to stop buying

veneer or the discussion of closing down (R. 191, 212) or to the resolution to sell the mill (R. 201). He agreed that there was nothing else to do (R. 201, 224). He was not present when the offer from Adams and Jacobson was accepted (Ex. 134H), but he had been present at the time the original resolution to sell the mill was adopted, and he and his corporations received specific notice of the pending sale to Nordic when Sutherlin sent its notice to creditors in compliance with the bulk sales law (Ex. 118). No objection was made. Under such circumstances, appellant was guilty of laches and should be held estopped.

19 *Am. Jur.*, Equity, Section 498, p. 343

CONCLUSION

The judgment and decree of the District Court should be affirmed.

(1) The sales contract was an *output* contract under which Sutherlin was obligated to sell to appellant 80 per cent of its actual production but was not prevented from decreasing or having no output or from selling its mill, provided it did so in good faith.

(2) There is no evidence that Sutherlin's forced shut-down, its inability to produce or the sale of its mill was

the product of bad faith, and all the evidence supports the finding of good faith.

(3) The evidence supports the findings that Sutherlin had already become disabled from producing and had decided to sell its mill before Nordic agreed to purchase the mill and even before it was incorporated. Therefore, Nordic did not induce Sutherlin to shut down, to fail to reopen or to sell its mill, and its purchase of the mill could not have been the proximate cause of any breach of contract by Sutherlin.

(4) The evidence supports the finding that Nordic purchased the mill only for the purpose of furthering its legitimate economic interests and without any purpose of injuring appellant or its rights in the sales contract. Therefore, Nordic's acts were privileged.

(5) There are no findings on the issue of damages. However, it cannot be estimated with reasonable certainty that there were any or a particular amount of damages to appellant, and the evidence supports the finding that Sutherlin had become disabled from producing prior to the sale of the mill. Therefore, no more than nominal damages are recoverable from Sutherlin and none are recoverable from Nordic.

(6) There are no findings on the issue of injunctive

relief, but, in any event, injunctive relief should not be given against Nordic because:

(a) Such would provide appellant with a wind-fall to which it is not entitled, and

(b) Appellant is guilty of laches and its conduct estops it from obtaining the aid of equity.

Respectfully submitted,

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No. 15271

In the

**United States Court of Appeals
For the Ninth Circuit**

OREGON PLYWOOD SALES CORPORATION,

Appellant,

v.

SUTHERLIN PLYWOOD CORPORATION and NORDIC
PLYWOOD, INC., *Appellees.*

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for
the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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ARGUMENT

I

THE TRIAL COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT SUTHERLIN BREACHED ITS CONTRACT WITH APPELLANT BY FAILING TO CONTINUE IN PRODUCTION AFTER APRIL 21, 1954, AND BY SELLING ITS MILL TO NORDIC ON SEPTEMBER 7, 1954.

A. The contract expressly requires Sutherlin to operate continuously during its term.

B. Even if the contract did not expressly require Sutherlin to operate continuously during its term, the contract, properly interpreted, required continuous operations.

For the convenience of the court the contract involved (Exhibit 1) is set out in the appendix to this brief.

The brief of the appellees indicates that they take the position that the provisions of the output contract do not unambiguously indicate that production is required throughout its entire term (Appellees' Brief p. 28, 31). They urge the Court that the essential term in the contract, which determines Sutherlin's obligation, is the term "output"; that the meaning of this term is to be found in the case law since the contract fails to define it; and that the case law declares that in such an instance the output promisor is not required to have an output if it decides in good faith not to have one. Consequently, appellees say that this Court need only decide whether there is evidence to sustain the trial court's finding of Sutherlin's good faith in closing its mill and later selling it to Nordic. Appellees maintain that if there is, then the output contract was performed.

Of course, it can be readily seen that if the appellees' major premises is erroneous, if the provisions of the contract give meaning to the term "output" and indicate that an output is required, the entire position of the appellees becomes untenable. If the contract requires an output, Sutherlin breached it by closing its mill and later by selling it to Nordic. If Nordic interfered with our contract rights by knowingly preventing performance of the contract, it committed a tort. Therefore, the provisions of the contract which require Sutherlin to remain in production for the term of the contract will again be examined.

As indicated in our opening brief, paragraphs three and four of page three of the contract hold Sutherlin to a standard of performance based on continuous production unless the mortgage is paid in full, even though Sutherlin is unable to produce because of fire, earthquake, disaster or act of God (Appellant's Op. Brief, p. 19-21). In *Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co.*, 239 F 603 (CCA 7, 1917) defendant agreed to transport plaintiff's coal on its boats on the Great Lakes. Plaintiff obtained a temporary injunction restraining the sale of defendant's boats. The temporary injunction was affirmed upon appeal to the Court of Appeals for the Seventh Circuit. The contract obligated defendant to transport coal on "all west

bound trips". There was no express provision that defendant's steamers would make any trips whatsoever. Defendant contended that its obligation to carry coal was conditioned solely upon its untrollable willingness to run the boats. The court refused to accept this contention and held that defendant's obligation to carry coal must be fairly interpreted in the light of the context of the contract and the relations of the parties. So interpreted, the court found that the contract carried with it the further implied obligation to run the boats in a reasonable manner continuously during the term of the contract. The court astutely observed that cases of this type cannot be governed by precedent. At p. 607 the court said:

"Precedent can throw but little light on the sound interpretation of such contracts, especially as to implying unexpressed obligations: each has its own individuality, its own background and surrounding circumstances. Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding; the underlying mutual intent, sought by both parties to be clothed in the language used, must be ascertained; text, context, and extrinsic circumstances, including prior negotiations and relations, may be considered to enable the court to view the matter from the standpoint of the parties at the time of making the contract."

Noting that the vis major clause of the contract provided for suspension of defendant's obligations during periods of floods, breaks, accidents, strikes, etc., the court observed that such a provision was unnecessary if defendant's duties were subject only to the owner's arbitrary right to run the vessels. At p. 607 of the opinion the court said:

“Looking at the agreement in its entirety, we find the circumstances that will suspend the obligation, in whole or in part, of each party, clearly specified, such as strikes, accidents, or the loss of a vessel; it is not the obligation to continue a west-bound voyage from Oswego once begun, but the obligation to continue in the conduct of its business, that is expressly remitted or suspended; clearly this has reference to the entire future of the three-year period of the contract; it would be unnecessary to abate the obligation to carry in the event that a vessel be destroyed, if the duty to carry from Oswego were subject to the owner's arbitrary right to keep the vessel on Lake Erie. Futhermore, such a construction would place this part of the plaintiff's business completely at the mercy of the shipowner, inasmuch as plaintiff's obligation is absolute, except for the specified excuses, to give defendant its cargo on call at the port. A bilateral contract of the nature here in question will not lightly be construed, so as to give one of the parties a virtual option, instead of imposing upon each of them obligations conditioned as they may have expressly agreed.”

In the present case there would likewise have been no need for the vis major clause in paragraph four on

page three of the contract if Sutherlin was free to discontinue operation whenever it determined to do so.

The argument of appellees concerning the meaning of paragraph four is not very clear (Appellees' Brief, p. 33). But apparently appellees contend that paragraph four means merely that the contract is to remain in full force and effect, that is, it is not to be discharged as a matter of law, in situations where Sutherlin is unable to produce because of fire, earthquake, disaster, or act of God. But this interpretation makes no sense at all when it is compared with the appellees' interpretation of the contract as a whole. Appellees say that the contract, interpreted as a whole, does not require Sutherlin to produce, if in good faith it does not or choose not to produce, and that Sutherlin is obligated to sell the appellant only 80 per cent of the output which it in good faith produces. What better example of good faith for not producing could be offered than a failure to produce because of fire, earthquake, disaster or act of God? In such situations, Sutherlin would be performing the contract according to the appellees' interpretation of it. Then why would the contract contain a provision that it is not to terminate as a matter of law in such situations? A provision is novel indeed when it says that a contract is not to terminate as a matter of law in situations where in fact and in law the con-

tract is being fully performed. It is clear that the appellees did not explain the meaning of paragraph four on page three, but instead read it out of the contract. The reason for this failure is plain. That paragraph cannot be explained consistently with appellees' interpretation of the contract as a whole.

In 3 *Corbin on Contracts*, p. 200 § 568 the following appears:

"One who contracts to buy all of his requirements of a specified article from another will under some circumstances be held to have promised by implication to keep his business going so that there will be such requirements."

At 3 *Corbin on Contracts* 200 § 568 the following is found:

"In any commercial agreement in which the compensation promise by one to the other is a percentage of profits or receipts, or is a royalty on goods sold, manufactured or mined, there will nearly always be found an implied promise of diligent and careful performance in good faith and of forbearance to make performance impossible by going out of business or otherwise."

As authority for the foregoing the author says in footnote 78 on p. 200:

"See *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F 2d 117 (CCA 3d, 1929) where the plaintiff,

a manufacturer of caustic soda, lent \$100,000 to the defendant for the erection of a factory in which caustic soda would be used, the defendant promising to buy it exclusively of the plaintiff for five years. It was held to be a breach of contract for the defendant to sell its business on terms that would prevent it from having any requirements of caustic soda; it had promised more than mere repayment of the loan."

Appellees' Brief says nothing concerning our interpretation of the fourth paragraph on page two. That paragraph provides for a deferment of the mortgage payments in the event that Sutherlin does not operate because the appellant does not furnish enough orders to enable Sutherlin "to dispose of 80% of the product of said mill." The mortgage payments are then to resume when orders are furnished sufficient to permit Sutherlin to operate for a period of two weeks. However, the appellees' interpretation of the contract as a whole makes the latter provision merely a signal to resume payments on the mortgage, for appellees must, of necessity, maintain that Sutherlin could refuse to honor such orders. Consider the case where Sutherlin had ceased operations because the appellant failed to submit orders, the mortgage payments had stopped, and then appellant furnished orders enabling a continuous operation for two weeks. If Sutherlin was free

not to operate when it chose not to do so, why would resumption of payment on the abated mortgage have been conditioned on the submission of orders which Sutherlin was not obligated to fill and which the parties contemplated would not be filled? Unless the appellant's orders were to have been filled in such a case, the act of submitting orders would be meaningless in terms of the normal implications of human behavior. But the submission of orders which can be and are going to be disregarded to signify that mortgage payments are to resume is too bizarre for serious consideration. The parties contemplated that the mortgage was to be paid as a result of the operation of the mill and must have contemplated that operation would resume when orders were received. Thus, there is another important provision of the contract which does not square with appellees' interpretation of it.

Paragraph four on page two refers to "80% of the product of said mill". We submit that the provision in paragraph one of the contract referring to "80% of the output of Party of the First Part when Party of the First Part gets into production" means "80% of the product of said mill" as the parties expressed it in paragraph four on page two of the contract. "Output" as used by the parties meant the product of Sutherlin's mill. Appellees say in their brief on page 22 that

Wells v. Alexandre, 130 NY 642, 29 NE 142, has been distinguished as an “exceptional case”. What the cases actually say is that *Wells v. Alexandre* involved an *exceptional contract* where the requirements were not the defendant’s requirements of coal but were the requirements of certain named steamers. *Edison Electric Illuminating Co. v. Thacher*, 229 NY 172, 128 NE 124; *William C. Atwater & Co. v. Terminal Coal Corp.*, 32 F. Supp. 178 (D. C. Mass. 1940). We submit that what the parties contemplated in the present case by the term output was the product of Sutherlin’s mill. The parties so indicated by their reference in paragraph four on page two to the “product of said mill”.

Paragraph three on page two is yet another provision discussed in our brief which appellees did not satisfactorily explain. Standing alone and unqualified it says:

“Party of the Second Part covenants to use its best effort to maintain with Party of the First Part a thirty days’ order file at the mill.”

Of course, it is elementary that where one party to a contract is required to perform his obligations thereunder, the other party must do likewise. According to appellees’ interpretation of the contract, Sutherlin would perform its obligations if it in good faith chose

not to have an output for a considerable period of time. Since Sutherlin would be performing in such a case, the appellant would be required to maintain a thirty-day order file which it knew would not be filled, remaining obligated to its customers for the orders in the interim. May we suggest that such an interpretation was not what the parties meant or intended, especially when paragraph two of page one of the contract requires Sutherlin to ship our orders within a reasonable time.

Especially important is the fact that appellant's obligations clearly ran for the term of the contract. Appellant was required, *for the term of the contract*, to finance green veneer purchases, to provide accounts receivable financing, to promote sales and furnish orders, and to extend a loan of \$80,000 repayable over the term of the contract. Surely the provisions of the contract indicate that Sutherlin was likewise bound to perform for the term of the contract.

Instead of interpreting the output contract in accordance with the provisions which it contains, appellees digress to the separate loan contract and refer to a provision which gives the appellant the option to declare the balance of the unpaid mortgage due and payable in case Sutherlin does not accept orders up to 80 per cent of its *capacity*. The meaning of this pro-

vision is plain, but appellees go too far, we think, when they suggest that the appellant's only remedy under the output contract for unfilled orders is this provision which is found in a separate contract.

The provision is informative of the parties intended meaning of the term "output" since they referred in the separate agreement to "80% of capacity", again implying that Sutherlin was expected to continue in business and have an output.

Thus, it is apparent that the appellees' interpretation of the output contract totally ignores a considerable part of its provisions. They offer nothing as to the vis major clause, the provision for abatement and resumption of the mortgage payments, the reference to "80% of the product of said mill" synonymously with 80% of Sutherlin's output, and the paragraph requiring the appellant to use its best efforts to maintain a thirty-day order file coupled with the provision that Sutherlin promised to ship appellant's orders within a reasonable time. There is no doubt what the contract means. Interpreted as a whole, as it must be, Sutherlin was obligated to a standard of performance based on continuous production. From this, as we have shown the rest of appellant's case follows, and the larger part of appellees' brief becomes immaterial.

B. Even if the terms of the contract did not expressly require Sutherlin to remain in business, continue to produce and refrain from disabling itself from performance by selling its mill, such intention should be implied. The rules, announced in *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F 2d 117 and *Texas Industries v. Brown*, 218 F 2d 510, are applicable to this case.

Appellees say at page 20 of their brief that the four-fold classification of cases appearing in our opening brief is ours and not Williston's, and then quote partially from the author's treatise. In the discussion commencing at 1 *Williston on Contracts*, Rev. Ed. 353 § 104A, the author groups the cases into three broad categories, the third of which actually consists of two categories. One requires good faith production (our second pattern of cases) and the other requires the promisor to maintain his business or plant as a going concern (our fourth pattern of cases). The entire discussion by Williston is set forth in the appendix to this brief.

An extensive quote from 3 *Corbin on Contracts* 204 appears at p. 30 of appellees' brief concerning the matter of leaving gaps unfilled by construction. Appellees should also have quoted the language on p. 207 of volume three to the effect that output contracts "very frequently do not justify the inference of a promise to carry on production" (implying, of course, that they may

justify such inference), and from footnote 23 on page 509 of volume one where the author says that "in some cases, the court has found an implied promise to remain in business during the specific period."

At page 28 of appellees' brief they say that "the best effort" provision furnishes no conceivable standard of performance, hence, it is too uncertain to be enforceable. They cite *First Natl. Bank v. Klock Produce Co.* (1917) 85 Or. 403, 166 Pac. 955 and *Barton v. Spinning* (1894) 8 Wash. 458, 36 Pac. 439. But those cases are not in point. It seems well established that a promise to use reasonable efforts or best efforts is sufficient consideration. In *Wood v. Lucy, Lady Duff-Gordon* 222 NY 88, 118 N.E. 214, 118 NE 1082, such a promise was not expressly contained in the contract, but was implied by the court and held to be a sufficient consideration.

It was expressly provided in the contract in this case that appellant should use its best efforts to promote sales. We say it was implied that Sutherlin would use its best efforts to supply the product for the sales.

Appellees register surprise (Appellees' Brief p. 21) concerning our statement that the rules expressed in the fourth pattern of case law do not apply here. The reason for this statement appears on pages 26 and 27 of our opening brief. It is that the terms of the contract clearly require continuous production, and con-

sequently there is no need to resort to the case law to determine whether such obligation should be implied.

Appellees' Cases.

Appellees appear to rely principally upon the following three cases: *In re United Cigar Stores Co.*, 8 Fed Supp 243, affd. 72 F. 2d 673 cert. den. sub. nom. *Consolidated Dairy Products Company, Inc. v. Irving Trust Co.*, 293 U.S. 617, 79 L. Ed. 706, and *William S. Gray & Co. v. Western Borax Co.* (CCA 9, 1938) 99 F 2d 239.

In *Re United Cigar Stores Co.*, *supra*, the requirements promisee became a voluntary bankrupt. A claim was filed for damages resulting from the failure of the bankrupt to have further requirements. The case stands only for proposition that under the particular facts involved the court found no implied agreement that the bankrupt would continue in business and have requirements for the term of the contract. In that case the court found that there were no provisions in the contract which indicated that the buyer was to remain in business and have requirements. It was claimed that a provision in the contract requiring claimant to sell 15,000 shares of stock of the bankrupt at one-half of the market price was such an indication. But the court found that such a provision was not sufficient and that it was intended to stimulate the purchases of ice cream by the bankrupt by giving it an interest in claimant's business.

United Cigar Stores Co. is not inconsistent with appellant's position. The court there clearly recognized the rule which we contend is applicable here. The court said at p. 245:

"Other provisions of the requirements contract may be strong enough to indicate an agreement that the buyer was to remain in business and continue to have requirements. *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F 2d 117 (C.C.A. 3); *Wiseman v. Dennis*, 158 Va. 431, 157 S.E. 716. See, also, the remarks of Kay, L.J., in *Hamlyn & Co. v. Wood & Co.*, supra [1891] 2 Q. B. at page 495."

The court in *United Cigar Stores Co.* thus recognized the rule of *Diamond Alkali Co.* that the provisions of the contract may indicate that the parties intended that the buyer was to remain in business and continue to have requirements. It merely found that the only provision in that case suggesting such an intention was the stock option and the court thought that provision was intended as an inducement to stimulate purchases of the seller's product. That provision alone was insufficient to show an intention of the parties that *United Cigar Co.* should remain in business and have requirements. On appeal the court of appeals for the Second Circuit also recognized the rule which we contend is applicable. In *Re United Cigar Stores Co.*, 72 F. 2d 673 at page 675 of the opinion the court said:

“In some cases emphasis has been placed upon a supposedly implied obligation of the buyer to continue to have requirements in substantially the same amount throughout the contract period (*Chalmers & Williams v. Walter Bledsoe & Co.*, 218 Ill. App. 363), or at least to continue in business for that period and have all the requirements resulting from such continuance [*Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; *Diamond Alkali Co. v. P. C. Tomson & Co.* (C.C.A.) 35 F. (2d) 117; *Great Lakes & St. L. T. Co. v. Scranton Coal Co.* (C.C.A.) 239 F 603]. *Wells v. Alexandre*, 130 N.Y. 642, 29 N. E. 142, 15 L.R.A. 218, is often cited to this effect though it really involved the purchase and sale of an amount of coal which was to be measured not by the requirements of the buyer but by the requirements of certain named steamers. Although the defendant sold the steamers, they continued to have requirements which were held to fix the amount of coal the defendant had agreed to buy.”

At p. 14 of their brief appellees discuss *H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co.*, (CCA 5, 1912) 194 Fed. 69, cert. den. 225, U. S. 706, 56 L Ed 1266 (1912). In that case there was an ordinary agreement to buy and sell such lumber as might be manufactured by defendants. In consideration for an extension of the contract for two years plaintiff loaned defendant \$6,000.00. The case merely holds that under the circumstances of that case the parties did not intend that the defendant was required to manufacture any particular quantity of lumber.

Appellees rely heavily upon the case of *William S. Gray & Co. v. Western Borax Co.*, *supra*. In that case defendant granted plaintiff an exclusive sales agency for the sale of its products for a period of 10 years. It was not an output or requirements contract. In that case there were no provisions such as those in the contract here involved which indicated that performance was to continue for the term of the contract. Of importance to the decision in that case was a provision in the contract that if and when the producer's net return fell below \$20.00 per ton at his plant, commissions on goods netting less than \$20.00 per ton at the plant would be subject to reconsideration and further mutual agreement. The court said at p. 242 of the opinion:

"Certainly the possibility (and, indeed, as proved by subsequent events, the actuality) that goods might net at the plant less than \$20 per ton and that the parties might be unable to agree upon what commissions should be paid on such sales, also negatives the implication of an unrestricted promise by the appellee to retain its properties and to continue to produce from them."

Defendants business declined and shortly after the National Bank Moratorium it sold its properties in June 1933. In view of the provision for reconsideration of the commissions when the price fell below \$20, the court

found that plaintiff could not establish its expected profits.

In the *William S. Gray* case the court undoubtedly believed that the general economic crisis of 1933 was not contemplated by the parties. In 18 *Cornell Law Quarterly* 269, 274, the author said:

“A general economic crisis, or a wholly unexpected collapse of the market for the vendee’s particular product, would seemingly justify his withdrawal from business. It does not follow, however, that unprofitable operations due merely to his own lack of wisdom in entering into the contract would constitute such an excuse.”

Appellees attempt at pp. 23-25 of their brief to distinguish *Diamond Alkali Co. v. P. C. Tomson Co.*, 35 F. 2d 117. They say that the court there “discerned an intention of the parties that the buyer’s requirements would *continue* to be as great as in its *already existing business*,” and contend that the case has no application here because Sutherlin’s was a new business. But there is no such statement in that case. The quantity of defendants requirements was not mentioned. The question was “whether or not under the terms of this contract there was an obligation on the part of the defendant to continue in business for five years and buy its supplies from the plaintiff during this time.” It was held that such an obligation was implied.

Appellees then say that the case was rejected in favor of applicable local law in *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.* 130 F. 2d 471, 473. But it is apparent that the facts in the latter case made the rule of *Diamond Alkali* inapplicable. The demand for defendant's product fell off, labor trouble developed and there was a marked reduction of defendant's business in 1937. There were no provisions of the contract which the court found sufficient to justify an obligation to continue in business.

Appellants then contend that here there was no "advantageous sale" as in *Diamond Alkali*. But in the present case the mill was sold for \$660,000.00 when its book value was only \$504,974.79 (Ex. 6, 133). Under appellees' theory that Sutherlin was on the verge of financial collapse and bankruptcy, this was not only an "advantageous sale"; it was nothing short of a bonanza.

In attempting to distinguish *Texas Industries v. Brown*, 218 F 2d 510 (CCA-5 1955), appellees say that the case involved a charge of bad faith on the part of the requirements buyer. It is true that the complaint there alleged that the transfer was deliberately arranged pursuant to a scheme to deprive the seller of the benefit of the contract. But the decision was not based on bad faith. The basis of the decision is found in the

sentence in the opinion immediately preceding the quotation from the case set forth in appellees' brief at p. 26. That sentence, found at page 512 of the opinion, is:

"The written agreement shows on its face that the requirements of the three block plants were the subject matter of the sale, and were within the contemplation of the parties."

So, in this case the output of the Sutherlin mill was the subject matter of the sale. The parties contracted in regard to the product of the mill and the mill has not ceased to operate and have an output. The court held that the provisions of the contract implied a promise "to keep the plants in operation lest, by disposing of them or shutting them down, the buyers be permitted to destroy the subject matter of the contract."

The Oregon cases do not definitely indicate the rule of interpretation followed in Oregon if a contract is silent on the meaning of the term "output" in an output contract. *Otto Seidenberg, Inc. v. Tautfest*, 155 Or 420 64 P 2d 534, indicates that the rule of the third pattern, namely, that output means normal output, was there applied. At p. 20 of their brief appellees quote the following from p. 425 of the opinion:

"The evidence shows good faith on the part of the grower and the exercise of good husbandry in an effort to produce the maximum amount of hops

contracted to be sold. The buyer was in no position to reject the hops by reason of the quantity."

The quotation indicates that the standard of performance required of an output seller is something more than good faith, namely, good husbandry. This case insofar as it might possibly be relevant here shows that the obligation of the output seller in an ordinary case is determined by the quantity of goods that *can be* produced in the exercise of good faith and good husbandry. It does not reject the doctrine which we contend is applicable here, namely, that under the particular contract involved Sutherlin was required to continue in business and have production for the term of the contract.

Appellees' position seems to be that all of the output and requirements contract cases follow the rule that the output promisor is never required to continue in business and to have production. It is fortunate that little time need be spent in discovering that the law is otherwise. It is reiterated that if the Court finds that the contract itself does not clearly indicate Sutherlin's obligations thereunder, the present case is not an ordinary one in which the only substantial commitments of the parties were the mutual promise to buy and sell. In addition appellant was obligated to loan Sutherlin

\$80,000.00 to be repaid during the term of the contract, to finance green veneer purchases for Sutherlin, interest free, for the term of the contract (at a rate of more than \$75,000.00 per month), to advance Sutherlin money against its accounts receivable for the term of the contract and to use its best efforts to promote the sale of Sutherlin's product for the term of the contract. These obligations were assumed by appellant for the entire term of the contract. It could not evade its obligations by going out of business or selling its assets. We submit that it is not reasonable that appellant would have assumed its obligations for the term of the contract while Sutherlin was free to destroy the contract at any time by going out of business or selling its plant. The note at 18 *Cornell Law Quarterly* 269 is particularly instructive. At page 270 of that article the author says:

“The purpose of such a contract is to enable a buyer to make provision for future needs, subject to fluctuations within reasonable limits about an estimated or reasonably understood figure, which he cannot definitely forecast: not to enable him to secure a source of supplies without obligating himself to take them if it would be more advantageous to dispose of or close down his business. These contracts are usually for long terms and the seller usually allows a preferential rate on his commodity, at the same time taking the risk of non-sale of the surplus. It is difficult, in the absence of an express stipulation which could easily be made, to assume

that a seller would intentionally enter into such a contract if it were to bind him absolutely, but be terminable with impunity whenever the other party at his personal option decided to go out of business."

In view of the obligations of appellant for the term of the contract it was surely intended by the parties that Sutherlin was required to continue production for the term of the contract and not to intentionally disable itself from further production by selling its mill or shutting it down.

At 3 *Corbin on Contracts* 209 § 570 the following appears:

"If a contract is such that a certain performance by one party is necessary in order to earn the compensation that has been promised him, and that performance can not be rendered without the active co-operation of the other party, a promise to render such co-operation will usually be implied."

In this case appellant was required to use its best effort to maintain with Sutherlin a thirty days' order file (Ex. 1, Par. 3, Page 2). In other words, appellant was required to use its best efforts to promote the sale of Sutherlin's product. That it did so (R. 83, 85) is undisputed in the testimony. But it could not render such performance without the active cooperation of Sutherlin, that is by Sutherlin's continuing in business and

producing plywood to be sold by appellant. According to Professor Corbin, a promise to render such cooperation—that is to continue in business and produce plywood—is usually implied. We submit that it should be so implied here.

Professor Williston, Professor Corbin and the cases cited by both appellant and appellee agree that the various provisions contained in the contracts may indicate an intention of the parties that continuous operation was contemplated or that the output promisor would not sell its plant or shut it down and thus disable itself from producing further. The cases relied upon by appellees recognize this doctrine, none of them reject it. In some of the cases the court found that there were no provisions in the contract which would make the rule applicable. We contend that this case comes within the rules enunciated in the following cases: *Wells v. Alexandre*, 130 NY 642, 29 NE 142; *Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co.* 239 F 603; *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F 2d 117; *Texas Industries, Inc. v. Brown*, 218 F. 2d 510; *Central States Power & Light Corp. v. United States Zinc Co.*, 60 F. 2d 832, cert. den. 287 U. S. 660, 77 L. Ed. 570.; *Fayette Kanawha Coal Co. v. Lake & Export Coal Corp.* 91 W. Va. 132, 112 S.E. 222.

Appellees imply at p. 19 of their brief that Judge McDermott in his dissenting opinion in *Central States*

Power & Light Corp. v. United States Zinc Co., supra, disagreed with the rule we contend is applicable. But he merely disagreed with application of the rule to the particular facts in the case and limited his dissent to the situation where the requirements purchaser went out of business. (Note that the majority held that the rule was applicable as well where the promisor went out of business during the term of the contract.) Judge McDermott makes it very clear that the promisor should not be permitted to evade his responsibilities by selling the mill. At p. 836 of the opinion he said:

“Vendee could not escape its obligation by selling the smelter; as long as the smelter required gas, the obligation remained.

At p. 837 of the opinion he cited several decisions which

“hold that an agreement to purchase the requirements of a business cannot be evaded by a sale or in other devious ways. With these decisions I am in entire accord.”

At p. 838 he said:

“There are numerous cases where a buyer undertook to escape his obligation by selling a business. But in those cases, the business continued to operate, and the agreement to buy its requirements of course remained undischarged.”

Mr. Hofheins testified that prior to the execution of the contract (Ex. 1) Sutherlin advised appellant that it "planned on producing plywood and continuing to produce plywood (R. 73). Mr. Steinbach, Sutherlin's secretary, confirmed that this intention was communicated to appellant. Speaking of the conversation with Mr. Hofheins, Mr. Steinbach testified (R. 115): "We informed him that we hoped to keep in operation. That was the idea of forming the company in the first place, was to produce plywood." We attempted to introduce evidence (R. 115) that Mr. Steinbach had testified unequivocally on his deposition that the intention and understanding of both parties was that the Sutherlin Plywood operation would be continued and that Sutherlin advised appellant that it intended continuous operation. However the court indicated that it assumed that Sutherlin "intended to continue operation at least 50 months" (R. 116) and we understood the court to mean that no further testimony on this point was needed. No attempt was made by appellees to rebut this testimony. Thus the discussions of the parties indicate that continuous operation was intended.

GOOD FAITH IS IMMATERIAL.

The court should determine whether the contract either expressly or impliedly requires Sutherlin to perform for the term of the contract and to forbear mak-

ing performance impossible by shutting down or selling its mill: If it was bound for the term of the contract, as appellant was, then the question is merely whether the contract was breached. Sutherlin's good faith or bad faith toward appellant is not material to the question of breach. In any event it is difficult to find any good faith on the part of Sutherlin when it never tried to operate from June to September, 1954 and disabled itself from performance by the sale at a handsome price when the market for its product was at an unprecedented high.

II

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT NORDIC TORTIOUSLY INTERFERED WITH AND INDUCED A BREACH OF APPELLANTS' CONTRACT WITH SUTHERLIN.

A. First appellees say there was no breach. Appellees argument on this point consists of stating the conclusion that Sutherlin was disabled from performing (Appellees' Brief p. 48). Apparently appellees concede that Sutherlin had a duty under the contract to try to operate. Evidence was introduced by appellees to show that at some time Sutherlin tried to obtain financing to continue operations (R. 192). But there is no evidence that any such efforts were made after the strike in the industry in June and the consequent in-

crease in the price of and demand for plywood. If any efforts had been made at that time they would undoubtedly have been successful. As we showed in our opening brief (pp. 38-42) Nordic successfully operated the mill with far less financial backing than Sutherlin had by virtue of its contract with appellant. And Nordic's liabilities were three times as great as Sutherlin's (Appellant's Brief 37).

Appellees say that the methods of operation and financial structure of Nordic were so different from Sutherlin's that the former's performance is no indication of what Sutherlin could have done. The "financial structures" were different in that Nordic had liabilities three times as great as Sutherlin's, had to finance its own green veneer purchases and discount its accounts receivable at the bank. The difference in "financial structures" were all in Sutherlin's favor.

The difference in method of operation if any, does not appear in the record. Appellees imply that there were differences. But the evidence is that Nordic started up the mill in September, 1954 in the condition the mill was when it was obtained from Sutherlin. (R. 232). New machinery was not installed until August 1955 (R. 237). Since appellees prevented Sutherlin from operating by disabling Sutherlin from performing, they should now be foreclosed from asserting that the mill

could not be operated. But in any event, the subsequent operation of the mill showed that it could be successfully operated.

Appellees have not contended¹ and there is no evidence that Nordic had better management than Sutherlin could have obtained. The evidence is that Sutherlin could have had John Adams, President of Nordic, as its manager. He applied for the job as manager of Sutherlin's mill before he made an offer to purchase it (R. 219, 220, 229, 230).

An explanation for the successful operation of the mill does appear in the record. It is that the price and demand for plywood was at an all time high during Nordic's operations (R. 88). Nothing in the record indicates that Sutherlin's operation would not have been equally as successful in the same market conditions. With the financial advantages available to Sutherlin under the contract (raw material and accounts receivable financing) Sutherlin probably would have done even better.

B. Second, appellees say that the contract would not have been performed in the absence of Nordic's purchase. But there is a presumption that contracts will be performed (Prosser on Torts 2d Ed., 725-26) and until the sale was actually consummated Sutherlin was in a position to perform the contract. The sale made

performance impossible. The record fails to show that Sutherlin tried to operate from June, 1954 to the sale in September, 1954. After disabling Sutherlin from performing by the sale of the mill, appellees should be estopped to claim that the contract could not be performed anyway.

C. Third, appellees say that Nordic did not induce Sutherlin's refusal to produce or its decision to sell the mill. Appellant contends that Nordic did induce Sutherlin's refusal to produce by participating in the very act which made Sutherlin's performance impossible, namely the sale of the mill. In June, 1954 Sutherlin's stockholders "authorized its directors to seek, sell or lease said mill, and in early June, 1954, defendant Sutherlin Plywood Corporation decided it would sell or lease said mill, if possible" Finding XVI, R. 57). But there is no evidence that any satisfactory offer was made by anyone other than Nordic. There is no evidence that the mill would have been sold in the absence of Nordic's offer.

It is true we inadvertently failed to include in our opening brief a specification of error that the court erred in entering Finding XVIII that Nordic's offer had been made pursuant to invitations for offers. But we think we clearly raised the issue by objecting (Appellant's Brief, p. 12) to Finding XXVI (R. 60) that Nordic

did not induce Sutherlin to sell the mill, by specifying this same objection in our points to be relied upon on appeal (R. 260) and by specifying as error in our opening brief the failure of the court to find and conclude "that Nordic interfered with appellant's contract rights and induced a breach of appellant's contract (R. 18). Appellees apparently recognized our intention since they argued this point at length in their brief at pp. 49-56.

There is some testimony that Sutherlin invited offers from others and that some offers came uninvited. (R. 129) but nothing appears in the testimony which would tend to show that Sutherlin invited Nordic's offer. It is clear that Nordic did make an offer (R. 129, 130, 218 and 230) and that was the offer which induced the sale. The other offers were unsatisfactory (R. 219, 130). Since Sutherlin made no invitation to Nordic its offer stands tortiously bare.

D. Finally, appellees say that Nordic's conduct was privileged because it was acting in furtherance of its own economic interests. Apparently appellees contend that so long as one acts in his own self interest he is privileged to interfere with another's contract rights. But the authorities cited by appellees at pp. 57-58 of their brief do not say that. In *Prosser on Torts* (1941) 999 the following appears:

“If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it * * * But where his interest is merely one of prospective advantage, not yet realized, he has no such privilege. The typical case is that of business competition. The courts have held that the sanctity of the existing contract relation takes precedence over any interest in unrestricted competition, and have enforced as law the ethical precept that one competitor must keep his hands off of the contracts of another.”

Nordic contended (R. 41) that it was in “competition with plaintiff for the production of said mill.”

The correct rule is stated in *Imperial Ice Co. v. Rossier*, 18 Cal, 2d 33, 112 P. 2d 631, 633, as follows:

“It is well established, however, that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other”.

The same rule is announced in *Restatement of Torts*, Sec. 768. Nordic was promoting no interest other than self-interest when it appropriated appellant’s contractual benefits to its own use. Its conduct was not privileged and cannot be justified.

III

THE RELIEF REQUESTED IS APPROPRIATE.

A. In our opening brief we suggested that since the evidence is undisputed concerning damages, this court should fix the amount of the damages occurring up to the time of trial and remand the case to the trial court to determine the subsequent damages. However, we believe appellees are correct in their assertion (Appellee's Brief p. 59) that it is not the function of this court to fix the amount of the damages and the trial court should be directed to make appropriate findings concerning damages.

The evidence is undisputed that appellant sustained damage of at least \$4,000.00 per month. Appellees do not challenge the sufficiency of the evidence except to say at p. 61 of their brief that since this was a new business there is no certainty that it would continue at any particular level. For authority they cite 5 *Corbin on Contracts* 130 § 1023. But again appellees refer to only that portion of the authors statement which they choose to accept. Professor Corbin's statement is as follows:

"If the business, the running of which is prevented by the defendant's breach, has not had such a history as to make it possible to prove with reasonable accuracy what its profits have been in fact, the profits prevented are often but not necessarily too uncertain for recovery. If in spite of the breach the

business is subsequently started, its subsequent history may afford sufficient evidence to justify the award of damages.”

In this case the business was subsequently started after the breach and Nordic’s records (Ex. 6, 133) show what the mill’s production and sales were. We do not have to speculate on the production and sales from the mill. We know what they were and the damages claimed are fully supported by the record. Having intentionally disabled Sutherlin from having an output, appellees should be estopped to deny that it would have been substantially what the mill did subsequently produce. The parties contracted with regard to the “product of said mill” (Ex. 1, p. 2, par. 4) and the damages requested are based on said product.

B. Injunctive relief is appropriate.

Appellees say at p. 62 of their brief that we have cited no authority for injunctive relief. But *Phez. Co. v. Salem Fruit Union*, (1922) 103 Or 514, 201 Pac. 222, 205 Pac. 970 is clear authority for injunctive relief (See appellant’s brief pp. 53-55). In that case the court said at p. 551:

“* * * Where a stranger wrongfully induces another to commit a breach of contract, or intentionally disables such other from discharging the obligations of his contract, the wrongdoer is liable in

damages, or in a proper case may be enjoined from carrying out his wrongful purposes.”

Speaking of the power to enjoin the court said at p. 535:

“The present case is one where the invoking of this power might be peculiarly efficacious.”

Appellees now claim for the first time that appellant is barred from equitable relief because of its conduct (appellee's brief pp. 62-63). But these innocuous suggestions were not made below and are not supported by the record. Appellees' only contention in the pre-trial order relating to these matters was that since appellant knew that Sutherlin intended to sell its mill and failed to object it was guilty of laches (R. 36, 41, 42). But the testimony was that Mr. Hofheins opposed a sale or lease if appellant did not get the output (R. 89). Apparently appellees do not make any serious contention that laches applies and since this suit was commenced on November 4, 1954, less than two months after the sale to Nordic, it is obvious that laches has no application.

CONCLUSION

The following provisions of the contract (Ex. 1) express the intention of the parties that Sutherlin would continue in business for the term of the contract and

would not make performance impossible by shutting down its mill or selling it and going out of business:

1. Appellant was bound for the term of the contract to (a) loan \$80,000 repayable over the term of the contract, (b) finance veneer purchases for Sutherlin, (c) finance accounts receivable for Sutherlin and (d) promote sales and furnish orders. It is inconceivable that appellant was expected to make these substantial commitments for the term of the contract unless Sutherlin was bound to continue in business and not prevent performance by selling its mill or shutting it down.

Sutherlin expressly agreed to accept and ship appellant's orders within a reasonable time. The parties expressed what they meant by "output" when they referred to "the product of said mill" in paragraph 4, page 2, Ex. 1. The contract related to the product of Sutherlin's mill and not merely to Sutherlin's output if it had one. Continuous production is expressly referred to in paragraph 4, page 2, Ex. 1 and in the discussions of the parties. ^{The} ~~This~~ vis major clause indicates that Sutherlin was held to a standard of performance based on continuous operations. Finally, the parties expressly covenanted that the contract was to be in full force and effect for its term for both parties.

Since appellant's obligations ran for the term of the contract and could not be evaded by shutting down or going out of business, it is implied that Sutherlin was

likewise bound. The provisions of the contract, the discussions and relations of the parties all imply an obligation by Sutherlin to continue in business and not to disable itself from performance by selling its mill or shutting it down.

Appellees' contentions that Sutherlin was unable to produce fall far short of establishing impossibility. The record shows that Sutherlin never tried to operate from June, 1954 until it sold the mill in September, 1954. Here was no general economic crisis or lack of market for Sutherlin's product, but the greatest market in history. Nordic proved that operation was feasible without free financing of veneer purchases and accounts receivable. Nordic obtained financing from the bank. In the same market with the same mill plus its other financing from appellant, Sutherlin could have done the same. Sutherlin simply chose to breach its contract and sell its mill. It must now pay appellant the damages caused by the breach. Nordic is liable for its wrongful appropriation of appellant's rights in the product of the mill.

Respectfully submitted,
KOERNER, YOUNG, McCOLLOCH &
DEZENDORF
Herbert H. Anderson
Charles H. Clarke
Attorneys for Appellant.

APPENDIX

The following is Exhibit 1, the sales contract between appellant and Sutherlin. The paragraph and page numbers of the original exhibit, to which reference is made in the briefs, are shown in parenthesis.

This contract made and entered into this 17th day of December, 1953, by and between Sutherlin Plywood Corporation, Party of the First Part, and Oregon Plywood Sales Corporation, Party of the Second Part;

Witnesseth:

(Paragraph two, page one)

In consideration of the benefits to be derived by each party hereto, Party of the First Part gives and grants unto Party of the Second Part the right to purchase up to 80% of the output of Party of the First Part when Party of the First Part gets into production, and Party of the First Part agrees to accept up to 80% and ship Party of the Second Part's orders as specified and within a reasonable time.

It is further agreed should Party of the First Part not sell the remaining 20% of its product in the ordinary course of business, Party of the Second Part shall have the right to purchase said 20% or part thereof not sold as aforesaid.

It is agreed that the price to be paid for the products of Party of the First Part shall be the wholesale jobber's market price from time to time. If for any reason the parties hereto cannot agree as to this price at any given time, then the price shall be determined by taking the average wholesale jobber's price as evidenced by: 1. Invoices; 2. Quotations; 3. Price lists; of the following ten mills:

Associated Plywood Co.
Anacortes Veneer, Inc.
Georgia-Pacific Plywood Co.
Vancouver Plywood Co.
M & M Woodworking Co.
Northwest Door Co.
Evans Products Co.
Columbia Veneer Co.
Clear Fir Sales Co.
Oregon-Washington Plywood Co.

Party of the Second Part covenants to advance to Party of the First Part 80% of mill value on each car promptly upon receipt of invoice and original bill of lading, balance within ten days after arrival of car at destination, all less 2% cash discount. Value of veneer paid for by Party of the Second Part in each car to be deducted from the payment.

Party of the First Part agrees as compensation for services by Party of the Second Part that an additional

5% of the Mill Value of product shall be retained by Party of the Second Part.

Party of the First Part covenants that it will not sell any of its product to other or others at a price lower than the above mentioned wholesale or jobber's price.

(Paragraph three, page two)

Party of the Second Part covenants to use its best effort to maintain with Party of the First Part a thirty days' order file at the Mill.

(Paragraph four, page two)

It is agreed that there is a mortgage on the mill property of the Party of the First Part to Oregon Plywood Corporation, with certain monthly and annual payments to be made, but in the event Party of the Second Part shall not, at any time or times during the term of said mortgage, furnish sufficient orders to Party of the First Part which would enable Party of the First Part to dispose of 80% of the product of said mill, and for such reason said mill does not operate, then during such period or periods the payments stipulated to be made on said mortgage shall be deferred until Party of the Second Part shall have furnished Party of the First Part orders which shall enable Party of the First Part to operate its mill continuously for the period of at least two weeks, whereupon the regular payments

on the mortgage indebtedness shall resume, and the term of said mortgage shall be extended accordingly.

(Paragraph five, page two)

Party of the First Part shall have the right to reject any orders placed with it by Party of the Second Part, provided specifications are not up to production conditions, nor if unprofitable. All orders shall be deemed accepted unless same shall have been rejected and notices of rejection received by Party of the Second Part within forty-eight (48) hours from receipt of order by Party of the First Part.

(Paragraph one, page three)

It is further agreed that any specification not covered by price procedure above mentioned shall be submitted to Party of the First Part for special price or its approval prior to acceptance of order.

It is further agreed that all plywood shall be manufactured, loaded and shipped in accordance with the Douglas Fir Plywood Association standards and the grade marked thereon, and that the shipping weights will not exceed the following weights per thousand surface feet: $\frac{1}{4}$ " 790 pounds; $\frac{5}{16}$ " 950 pounds; $\frac{3}{8}$ " 1125 pounds; $\frac{1}{2}$ " 1525 pounds; $\frac{5}{8}$ " 1825 pounds; $\frac{3}{4}$ " 2225 pounds.

(Paragraph three, page three)

This sales contract shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50 months [but this agreement shall be extended one month for each \$3,000.00 advanced over said \$50,000.00. Initialed: R. F. H., M. Wood.]* but under no circumstances shall expire until the mortgage by Party of the First Part to Oregon Plywood Corporation shall be paid in full.

(Paragraph four, page three)

It is understood and agreed that if the Party of the First Part is unable to produce because of fire, earthquake, disaster or act of God, this contract shall continue in full force until the mortgage heretofore mentioned is paid in full.

It is further agreed that Party of the Second Part shall acquire one share of stock in Party of the First Part, and Party of the First Part shall keep a representative of Party of the Second Part upon its Board of Directors until the mortgage given by Party of the First Part to Oregon Plywood Corporation shall be paid in full, at which time said share of stock shall be surrendered to Party of the First Part upon Party of the Second Part being paid the original purchase price therefor.

*Handwritten.

In witness whereof, this agreement has been signed in duplicate by the duly authorized officers of each corporation, and the seal of each such corporation is attached hereto, the date first hereinabove written.

SUTHERLIN PLYWOOD CORPORATION,
a corporation,

/s/ By MILLARD WOOD, President

OREGON PLYWOOD SALES CORPORATION,
a corporation,

/s/ By ROBERT F. HOFHEINS, Secy.-Treas.

WILLISTON ON CONTRACTS (Rev. Ed.) page 353.

§ 104A. Consideration in bilateral “requirement” and “output” contracts.

It was held in an early Minnesota case that a bargain to sell all that the buyer might require or want in his business lacked consideration, as it left the performance optional, though the buyer promised to buy all he should require; but the weight of authority is clearly otherwise, whether the buyer agrees to buy all that he requires or the seller agrees to sell all that he produces, and rightly.

It is not always easy to determine the correct interpretation of contracts of the general type of those last mentioned. Division of the cases into three classes has

been suggested. The first would regard the contract as involving only an obligation to sell to or buy from the promisee all of such goods that the promisor shall produce or shall require, as the case may be, and to sell such goods to or buy them from no one else. On this interpretation though it be assumed that a seller by ceasing to manufacture may relieve himself from any performance and still keep a promise to sell all the goods he manufactures, and similarly a buyer by going out of business may avoid performance while still observing the terms of an agreement to buy all that he requires, these results can be obtained only by doing something which is in itself a legal detriment, namely, the cessation of business. Even a promise to buy or sell only as much as the promisor chooses is a sufficient consideration when coupled with the agreement that whatever the buyer or seller chooses to buy or sell he will buy from or sell to the promisee. To put the matter in another way—the promise of a seller not to manufacture except for the buyer, or the promise of a buyer not to buy except from a particular seller, is clearly a promise to do something detrimental. A few cases seem to admit that though a contract to buy and sell the requirements or output of a particular factory is a valid contract, an agreement which gives the buyer or seller an option to take or to produce no goods is invalid, although he

agrees that if he should buy or produce any goods of the kind in question he would buy them from or sell them to the promisee. These decisions cannot be supported.

Other courts hold that where abstention from dealing is so unreal and so profitless to the promisee that it cannot be presumed to have been contemplated by the parties as a bargaining factor, such a consideration cannot be regarded as sufficient, especially when not expressed in literal terms. And, being reluctant to give one party so wide a power as that suggested in the first class of cases, unless the language of the contract clearly makes it necessary, these courts will rather seek to find what they regard as the more reasonable intention that the seller has agreed to sell and the buyer to take the buyer's normal or ordinary needs, subject to the reasonable variations of a business continuing on substantially the same scale, yet, if the wider power is given, the contract is not without sufficient consideration.

A third class of cases, not wholly inconsistent with the first, finds from the business situation, from the conduct of the parties, and from the startlingly disproportionate burden otherwise cast upon one of them, a promise implied in fact by the seller to continue in good faith production or sales, or on the part of the buyer to maintain his business or plant as a going concern and

to take its bona fide requirements. In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party, but recognizes that either party may in good faith cease to have such output or requirement. Some cases go further and assume that there is an average or contemplated output or requirement which is to be produced or will be needed by the promisor, subject to ordinary fluctuations, and that he will subordinate his own interest as to carrying on his business to the performance of the contract as contemplated.

No. 15273

United States
Court of Appeals
for the Ninth Circuit

PACIFIC VEGETABLE OIL CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
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FILED

JAN 14 1957

PAUL P. O'BRIEN, CLERK

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of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Witness:

Simpson, Harrison H.

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NAMES AND ADDRESSES OF ATTORNEYS

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400 Montgomery Street,
San Francisco, California,
Attorney for Petitioner.

CHARLES K. RICE,
Assistant United States Attorney General

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Attorney, Department of Justice
Washington 25, D. C.
Attorneys for Respondent.

The Tax Court of the United States

Docket No. 50344

PACIFIC VEGETABLE OIL CORPORATION,
a corporation, Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:

For Petitioner: Dudley F. Miller, Esq.

For Respondent: Edward H. Boyle, Jr., Esq.

DOCKET ENTRIES

1953

Aug. 31—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 1—Copy of petition served on General Counsel.

Oct. 13—Answer filed by General Counsel.

Oct. 13—Request for hearing in San Francisco, California filed by General Counsel.

Oct. 16—Notice issued placing proceeding on San Francisco, California calendar. Service of answer and request made.

1955

Mar. 31—Hearing set July 5, 1955, San Francisco, California.

Apr. 20—Notice hearing changed to 6/27/55, San Francisco, California.

1955

- Jun. 28—Hearing had before Judge Harron, on the merits. Stipulation of facts filed at hearing. Briefs due 9/19/55. Replies due 10/21/55.
- Jul. 13—Transcript of hearing 6/28/55 filed.
- Sept. 19—Brief filed by taxpayer. 9/20/55 Copy served.
- Sept. 19—Brief filed by General Counsel.
- Oct. 21—Reply brief filed by taxpayer. 10/24/55 Copy served.

1956

- Apr. 5—Findings of fact and opinion filed, Harron, Judge. Decision will be entered for respondent. 4/5/56 Served.
- Apr. 5—Decision entered, Judge, Harron, Div. 13.
- Jul. 2—Petition for review by United States Court of Appeals, Ninth Circuit, with notice of filing and affidavit of service by mail attached, filed.
- Jul. 19—Designation of Record on review with proof of service thereon, filed.

[Title of Tax Court and Cause.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency in income tax liability set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Appellate Division—Los Angeles District, Room 710, 630 San-

some Street, San Francisco 11, California: ADC-Ap:LA SF:LB:HVVH-90-D) dated June 5, 1953, and as the basis of its proceeding alleges as follows:

I.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business at 62 Townsend Street, in the City and County of San Francisco, State of California. The income tax return of petitioner for the year involved in this proceeding was filed with the Collector of Internal Revenue, First California District at San Francisco, California.

II.

The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit "A" was mailed to petitioner on June 5, 1953.

III.

The taxes in controversy are corporate income taxes for the calendar year ending December 31, 1949, the deficiency asserted therein being \$148,867.81, the amount in issue being the sum of \$112,960.50.

IV.

The determination of the taxes set forth in said Notice of Deficiency is based upon the following errors:

1. The Commissioner of Internal Revenue erred in disallowing as a deduction from gross sales the

amount of \$159,256.16 representing the balance on December 31, 1949, in an account designated "Reserve for Outturn Settlements" which account applied exclusively to contracts covering in transit copra shipments.

2. The Commissioner of Internal Revenue erred in including in gross income the said amount of \$159,256.16, or any part thereof, which amount represented unascertainable and wholly contingent claims to future income.

3. The Commissioner of Internal Revenue erred in holding that the accounting method of making allowance for such outturn settlements used by the petitioner in years prior to 1949 properly reflected income.

4. The Commissioner of Internal Revenue erred in holding that said deduction of said amount of \$159,256.16 in the year 1949 as a reserve for outturn settlements upon contracts covering copra shipments in transit at December 31, 1949 represented a change in method of accounting for which permission was required to be secured from the Commissioner of Internal Revenue.

5. The Commissioner of Internal Revenue erred in holding said amount of \$159,256.16 represented contingent liabilities not definitely accrued in the taxable year.

6. The Commissioner of Internal Revenue erred in failing to hold that said amount of \$159,256.16 represented unascertainable and wholly contingent claims to future income.

7. The Commissioner of Internal Revenue erred

in eliminating from petitioner's net income for said taxable year dividend income of \$296,120.00 representing the amount received by petitioner in 1949 from Western Vegetable Oils Company Incorporated, a corporation.

8. The Commissioner of Internal Revenue erred in refusing to allow as a credit against net income the sum of \$251,702.00 representing 85% of dividends totaling \$296,120.00 received by petitioner in 1949 from a domestic corporation, Western Vegetable Oils Company, Incorporated.

9. The Commissioner of Internal Revenue erred in his determination that petitioner realized capital gain in the amount of \$277,288.00, or any part of said amount, from the distribution made by Western Vegetable Oils Company, Incorporated, in 1949 to petitioner in the sum of \$296,120.00.

10. The Commissioner of Internal Revenue erred in increasing petitioner's income tax liability for said taxable year by the sum of \$69,322.00 representing 25% of said alleged capital gain of \$277,288.00.

11. The Commissioner of Internal Revenue erred in including in petitioner's income for said taxable year any capital gain arising from the distribution in 1949 of the sum of \$296,120.00 to petitioner from Western Vegetable Oils Company, Incorporated.

12. The Commissioner of Internal Revenue erred in his determination of the net taxable income of petitioner for the calendar year 1949 and in assessing any deficiency against petitioner for said year in excess of the sum of \$35,907.31.

V.

A. The facts upon which petitioner relies as the basis of this proceeding relating to assignments of error Nos. 1 to 6 inclusive and No. 12 are as follows:

1. Petitioner is engaged in the business of manufacturing, processing, handling and dealing in vegetable oils and vegetable oil raw materials in the United States and elsewhere in the world. As a part of its operations petitioner purchases copra, the raw material from which coconut oil is manufactured, in the Philippine Islands and sells the same to purchasers elsewhere in the world, chiefly in Europe and Latin-America.

2. The majority of all the petitioner's sales of copra are made under written contracts providing for payment for the quantity delivered to the buyer on the basis of landed weights, i.e., on the basis of the quantity actually delivered at destination. These contracts also provide that payment shall be made by the buyer for 95% of the quantity shipped by draft against shipping documents. In the event that the price payable upon a landed weight basis exceeds or is less than said 95% of the purchase price so received, appropriate settlement is made between seller and buyer.

3. All copra contains varying amounts of moisture at the time of shipment and some shrinkage in transit is commonly experienced. Actual shrinkages on individual shipments may vary over a wide range, from no shrinkage to shrinkage as high as 10% or 12% of the quantity shipped.

4. Petitioner, on its copra shipments, experi-

ences a shrinkage in excess of 4% and in the calendar year 1949 experienced an average actual shrinkage of 4.31%. By the terms of said sales contracts only 95% of the invoice value of the copra shipped is collectible until the cargo has arrived at destination and landed weights are determined and at that time only any excess of landed weights over shipped weights is collectible. Prior to the calendar year 1949 petitioner followed a practice of crediting sales income with 100% of the invoice value of each shipment on the basis of shipped weights, subsequently deducting from sales income at some later date the value of the shrinkage actually experienced in transit. This practice resulted in a continual over-statement of sales income. For the calendar year 1949 petitioner adopted the practice of crediting sales income at time of shipment only with the amount collectible at time of shipment, namely 95% of the invoice value of the quantity shipped, the remaining 5% being set up as contingent income in an account called a reserve for outturn settlements. Upon receipt of actual landed weights an adjusting entry is made eliminating the reserve applicable to the particular shipment and crediting sales for any additional amount receivable and charging sales for any amount refundable to the buyer. Said amount of \$159,256.16 standing in said reserve at December 31, 1949 and deducted by petitioner from gross sales for said year represents the 5% balance uncollectible and uncollected on specific sales contracts with respect to which landed weights had not then been determined.

B. The facts upon which petitioner relies as the basis of this proceeding relating to assignments of error Nos. 7 to 12 inclusive are as follows:

1. Prior to the calendar year 1949 petitioner owned 2,094 of the 5,182 shares of capital stock of Western Vegetable Oils Company, Incorporated, then issued and outstanding.

2. On December 31, 1948 said Western Vegetable Oils Company, Incorporated, had earnings and profits accumulated subsequent to February 28, 1913, in an amount not less than \$768,299.64.

3. On December 31, 1948 Western Vegetable Oils Company, Incorporated, held cash in the amount of \$448,201.72 and was possessed of other quick assets.

4. During the calendar year 1949 Western Vegetable Oils Company, Incorporated, purchased 2,032 shares of its outstanding capital stock for a total consideration of \$433,040.00.

5. Of said 2,032 shares, 1,346 shares were acquired from petitioner for a total consideration of \$296,120.00.

6. On December 31, 1949 Western Vegetable Oils Company, Incorporated, held cash in the amount of \$238,503.21 and had 3,150 shares of capital stock outstanding.

7. The entire purchase price of \$433,040.00 paid by Western Vegetable Oils Company, Incorporated, in 1949 for said 2,032 shares of capital stock was charged to the earned surplus account of said Western Vegetable Oils Company, Incorporated.

8. On December 31, 1949 said Western Vegetable Oils Company, Incorporated, had earnings and prof-

its accumulated subsequent to February 28, 1913 in an amount not less than \$503,756.80.

9. At all times subsequent to its purchase of said 2,032 shares of capital stock Western Vegetable Oils Company, Incorporated, has had sufficient funds to finance its normal business operation, has held the same plant and equipment and has continued to conduct its business in the same manner as prior to said purchases of capital stock.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income taxes for the calendar year 1949 due from petitioner herein in excess of the sum of \$35,907.31, and for such other and further relief as to this Court may seem meet and proper in the premises.

/s/ DUDLEY F. MILLER

Counsel for Petitioner

Duly Verified.

EXHIBIT "A"

U. S. Treasury Department, Office of the District
Commissioner, Internal Revenue Service, Ap-
pellate Division, Los Angeles District, Room
710, 630 Sansome Street, San Francisco 11,
California. June 5, 1953

In Replying Refer to: ADC-Ap:LA SF:LB:HVB-
90-D.

Pacific Vegetable Oil Corporation
62 Townsend Street, San Francisco, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year 1949 discloses a deficiency of \$148,867.81, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant District Commissioner, Appellate, Room 710, 630 Sansome Street, San Francisco 11, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS

Commissioner

/s/ By WM. G. WILKER

Assistant Head, Appellate Division

Enclosures: Statement, Form 1276, Agreement Form.

STATEMENT

Tax Liability for the Taxable Year Ended
December 31, 1949

Year	Liability	Assessed	Deficiency
1949	\$189,303.58	\$40,435.77	\$148,867.81

In making this determination of your income tax liability, careful consideration has been given to your protest dated November 8, 1951 and to the statements made at the conferences held on August 27, 1952, October 24, 1952 and April 1, 1953.

Adjustments to Net Income

Year: 1949

Net income as disclosed by return		\$375,910.91
Unallowable deductions and additional income:		
(a) Reserve for settlement allowances	\$159,256.16	
(b) Net long-term capital gain	277,288.00	
(c) "Lifo" inventory adjustment	85,821.41	
(d) Depreciation allowance decreased	8,841.03	531,206.60
Total		<u>\$907,117.51</u>
Nontaxable income and additional deductions		
(e) Dividends	\$296,120.00	
(f) Franchise tax	169.50	296,289.50
Net income as adjusted		<u>\$610,828.01</u>

is taxable as long-term capital gain realized from the sale or other disposition of property in the amount calculated as follows:

Proceeds from 1346 shares	\$296,120.00
Cost Basis of stock sold	18,832.00
Long-term capital gain	<u>\$277,288.00</u>

Accordingly dividend income of \$296,120.00 and the offsetting credit of \$251,702.00 are eliminated from your net income and the long-term capital gain of \$277,288.00 is substituted therefor.

(c) In 1949 inventories were priced at the lower of cost or market except for copra and flaxseed which were priced at "Lifo." In 1950 you elected to go on the "Lifo" method of pricing certain other commodities. Taxable income for the year 1949 is increased \$85,821.41 as a result of this change in the method of pricing these commodities. The increase is computed as follows:

Date	Description	Valued at Lower of Cost or Market	Valued at Cost	Write-down from cost to Market
12/31/49	Soybeans	\$ 55,530.84	\$ 55,530.84	\$ 0.00
	Crude linseed oil	479,268.46	480,781.25	1,512.79
	Crude coconut oil	32,058.93	32,058.93	0.00
	Crude wood oil	252,360.15	252,360.15	0.00
	Crude fish oil	159,238.86	232,782.58	73,543.72
	Crude soya oil	49,196.28	49,196.28	0.00
	Plain & Fancy tallow	92,477.97	103,242.87	10,764.90
	Edible tallow	16,605.57	16,605.57	0.00
	Totals	<u>\$1,136,737.06</u>	<u>\$1,222,558.47</u>	<u>\$85,821.41</u>

(d) The deduction for depreciation is decreased \$8,841.03 due to the increase in estimated life of

certain machinery and equipment from eight years, as claimed on your return, to ten years.

(e) See item (b)

(f) Deduction for California franchise tax is increased \$169.50 as follows:

Increase in franchise tax based on adjustments to 1948 income (as disclosed by Franchise Tax Board letter dated May 22, 1951)	\$1,917.89
Less: 1946 deficiency claimed on 1949 return	1,748.39
Net increase	<u>\$ 169.50</u>

The 1946 deficiency claimed on your 1949 return was allowed as a deduction in the previous determination of your 1946 Federal income tax liability.

Computation of Tax—Year 1949

Alternative Tax:

Net income		\$610,828.01
Less: Excess of net long-term capital gain over net short-term capital gain		277,288.00
Ordinary net income		<u>\$333,540.01</u>
Dividends received credit:		
	Dividends	Credit at 85%
Disclosed by return	\$317,060.00	\$269,501.00
Reduction herein	296,120.00	251,702.00
As revised	<u>\$ 20,940.00</u>	<u>\$ 17,799.00</u>
Net income subject to normal tax and surtax		<u>\$315,741.01</u>
Normal tax at 24%		\$ 75,777.84
Surtax at 14%		44,203.74
Total normal tax and surtax (partial tax)		<u>\$119,981.58</u>
Add: 25% of excess of net long-term capital gain over net short-term capital gain		69,322.00
Alternative tax		<u><u>\$189,303.58</u></u>

Tax at ordinary rates:

Net income	\$610,828.01
Less: Dividends received credit as disclosed by the foregoing	17,799.00
Net income subject to normal tax and surtax	<u>\$593,029.01</u>
Normal tax at 24%	\$142,326.96
Surtax at 14%	83,024.06
Income tax at ordinary rates	<u>\$225,351.02</u>
Income tax liability (alternative tax)	\$189,303.58
Income tax assessed:	
Original Account No. 4101598, First California District	40,435.77
Deficiency in income tax	<u>\$148,867.81</u>

[Endorsed]: T.C.U.S. Filed Aug. 31, 1953.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

I. and II.

Admits the allegations in paragraphs I and II.

III.

Admits that the taxes in controversy are corporate income taxes for the calendar year ending December 31, 1949, the deficiency asserted therein be-

ing \$148,867.81; denies the remaining allegations in paragraph III.

IV.

1. to 12., inclusive. Denies the allegations of error in subparagraphs 1 to 12, inclusive, of paragraph IV.

V.

A. 1. and 2. Admits the allegations in subparagraphs A. 1 and 2 of paragraph V.

A. 3. Admits that all copra contains varying amounts of moisture at the time of shipment and some shrinkage in transit is commonly experienced; denies the remaining allegations in subparagraph A. 3 of paragraph V.

A. 4. For lack of information, denies the allegations in subparagraph A. 4 of paragraph V.

B. 1. Admits the allegations contained in subparagraph B. 1. of paragraph V.

B. 2., 3., and 4. For lack of information, denies the allegations in subparagraphs B. 2., 3., and 4. of paragraph V.

B. 5. Admits the allegations in subparagraph B. 5 of paragraph V.

B. 6. to 9., inclusive. For lack of information, denies the allegations in subparagraphs B. 6. to 9., inclusive, of paragraph V.

VI.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination in all respects be approved and the petitioner's appeal denied.

/s/ KENNETH W. GEMMILL,
CWN

Acting Chief Counsel, Internal
Revenue Service

Of Counsel:

B. H. Neblett, Regional Counsel,
E. C. Crouter, Acting Appellate Counsel,
Edward H. Boyle, Special Attorney,
Internal Revenue Service

[Endorsed]: T.C.U.S. Filed Oct. 13, 1953.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts should be taken as true, without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith.

I.

Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at 62 Townsend Street, San Francisco, California, and Petitioner is engaged in the business of manufac-

turing, processing, handling and dealing in vegetable oils and vegetable oil raw materials in the United States and elsewhere in the world. As a part of its operations Petitioner purchases copra, the raw material from which coconut oil is manufactured, in the Philippine Islands and sells and ships the same to purchasers elsewhere in the world, chiefly in Europe and Latin-America.

* * * * *

IV.

Western Vegetable Oils Company, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at 24 California Street, San Francisco, California. The corporation was organized in the year 1935 for the purpose of engaging in the vegetable oil business, chiefly in the crushing of copra and other oil bearing materials, the production of coconut oil and other vegetable oils and copra meal and other vegetable oil meals therefrom and the sale of said products in the markets of the United States; the said corporation engaged in said business from its formation to and including March 31, 1954, at which time its copra crushing operations were discontinued due to unfavorable economic conditions in the copra crushing industry.

V.

At the beginning of the calendar year 1949 Western Vegetable Oils Company, Incorporated, hereinafter called "Western" had only one (1) class of

22 *Pacific Vegetable Oil Corporation vs.*

shares of capital stock outstanding, namely 5,182 shares of common stock standing in the names of the following shareholders, in the following amounts and percentages:

Name	No. of Shares	Percentages
Pacific Vegetable Oil Corporation	2,094	40.4091
A. A. Schumann	1,252	24.1605
S. L. Jones & Co. (transferred to W. A. Dow, a shareholder and officer of S. L. Jones & Co. in June 28, 1949)	900	17.3680
R. J. Boomer	250	4.8244
D. S. Burness	178	3.4350
Muriel Burness	178	3.4350
Estate of P. C. Denroche, Deceased	140	2.7016
Thos. A. Allan	140	2.7016
Paul A. Schumann	25	.4824
F. Nelson	25	.4824
Total	5,182	100.0000

VI.

During the calendar year 1949 and in the month of January, 1950, Western acquired from said shareholders, pursuant to resolutions of the Board of Directors of Western, duly adopted at meetings of said Directors duly called and held, copies of which are attached hereto and made a part hereof, and marked Exhibits 3C through 6F, 3,182 of its shares above listed; that the names of the shareholders, the number of shares acquired from each, the cash per share distributed by Western and the balance of shares thereafter held by each shareholder are as shown in the table below:

Name	No. of Shares Acquired	Date of Acqui- sition	Cash Dis- tributed Per Share	Total Cash Distri- buted	Remaining Shares Held
Estate of P. C.					
Denroche, Dec'd.	140	4/30/49	\$120	\$ 16,200	none
Pacific Vege- table Oil					
Corporation	1,346	10/24/49	220	296,100	748
D. S. Burness	178	11/ 4/49	220	39,160	none
Muriel Burness	178	11/4/49	220	39,160	none
Thos. A. Allan	140	10/24/49	220	30,800	none
Paul A.					
Schumann	25	10/24/49	220	5,500	none
F. Nelson	25	10/24/49	220	5,500	none
W. A. Dow	900	1/ 5/50	220	198,000	none
R. J. Boomer	250	1/10/50	220	55,000	none
A. A. Schumann	0	-----	-----	0	1252

As of December 31, 1948 the book value of said shares was \$220.00 per share. On August 16, 1949 Western declared (and subsequently paid) a dividend of \$10.00 per share to shareholders of record as of August 17, 1949, as shown by resolution of the Board of Directors of Western dated August 16, 1949, attached hereto and marked Exhibit 7G. Attached hereto and marked Exhibit 8H is a table constituting a true and correct summary analysis of the earned surplus account of Western from the commencement of its business to and including December 31, 1950. On or about the 17th day of February, 1950 Petitioner purchased from A. A. Schumann 252 shares of stock held by him in Western at a price of \$220.00 per share, for the purpose of rendering the ownership of Petitioner and A. A. Schumann of the outstanding stock of said corporation equal.

VII.

Western continued its copra crushing and oil manufacturing activities from the commencement of its business in 1935 until approximately March 31, 1954. The following is a tabulation of the quantities of copra and certain other oil bearing raw materials crushed by Western in each of the years 1942 to 1953, inclusive

Year	Copra Crushed (in pounds)		Other Materials Crushed (in pounds)	
1942	14,239,168		Babassu	12,146,672
			Mustard	
			Seed	1,843,991
			Rice Bran	30,720
			Cohune	78,582
			TOTAL	14,099,965
1943	19,420,504			—0—
1944	27,725,436			—0—
1945	28,504,080			—0—
1946	39,022,794			—0—
1947	53,270,880		Babassu	2,129,576
1948	25,304,012		Babassu	4,680,933
	6,754,070	(Crushed by	Sesame	2,515,955
	32,058,082	others for	TOTAL	7,196,888
		Western acct.)		
1949	38,249,910			—0—
1950	33,875,264		Sesame	2,024,473
1951	47,581,862			—0—
1952	38,907,292			—0—
1953	26,021,450			—0—

Attached hereto and marked Exhibit 9-I are true and correct comparative balance sheets of Western for the calendar years ended December 31, 1948 -

December 31, 1953, inclusive; attached hereto and marked Exhibit 10J are true and correct copies of statements of the net income of Western for said years, as reported by Western on its corporation income and excess profits tax returns for each of said years.

That all plant and equipment owned and maintained by Western prior to the calendar year 1949 continued to be owned and maintained by Western to and including March 31, 1954.

VIII.

On its income tax return, Form 1120, for the calendar year 1949, Petitioner reported as a dividend the proceeds received from Western upon the acquisition by Western of said 1,346 shares of Western stock above listed, said proceeds being in the amount of \$296,120.00. Offsetting this dividend a credit was claimed for 85% of such dividend resulting in the inclusion of taxable income of the sum of \$44,418.00. Attached hereto marked Exhibit 11K is a photostatic copy of Petitioner's return for said year.

IX.

Petitioner's basis in said 1,346 shares of Western stock acquired by Western from Petitioner in 1949 was a total of \$18,832.00.

/s/ DUDLEY F. MILLER,

Counsel for Petitioner

/s/ JOHN POTTS BARNES,

Counsel for Respondent

JOINT EXHIBIT No. 3-C

Minutes of Stated Meeting, Board of Directors of
Western Vegetable Oils Company, Incorporated
April 27, 1949

Pursuant to the provisions of the By-Laws and notice thereof given to all of the directors, the stated monthly meeting of the Board of Directors of Western Vegetable Oils Company Incorporated was held on April 27, 1949, at the hour of 2:00 o'clock p.m. at the office of the company, 24 California Street, San Francisco, California, having been postponed from April 19, 1949 by consent of all Directors.

There were present the following Directors:

Adolph A. Schumann, Ralph J. Boomer, William A. Dow, Jr., Thos. A. Allan, B. T. Rocca.

Also present: Dudley F. Miller, Secretary of the company.

The minutes of the meeting of March 15, 1949 were read and approved.

The President presented and the Directors examined and discussed the company's balance sheet and income statements for the year to date. The Directors also examined the company's position statements from which it appeared that substantial profits would accrue from operations by the end of June of this year.

The President reported on the proceedings for the appraisal of the company's physical properties, stating that he had not yet received final estimates on the cost of the appraisal.

The President presented to the Directors a letter

which he had received from The Bank of California, N.A., as executor of the estate of Percy C. Denroche, deceased, requesting bids for the purchase from The Bank of California, N.A., as executor, of one hundred forty (140) shares of the stock of this corporation held by the estate. After some discussion the following resolution was moved, seconded and unanimously carried:

Whereas, The Bank of California, N.A., as executor of the estate of Percy C. Denroche, deceased, is the owner of one hundred forty (140) shares of the capital stock of this corporation and, being desirous of selling the same, has requested bids therefor,

Whereas, this corporation has an earned surplus sufficient to enable it to purchase said shares, and it is deemed to be to the best interest of this corporation to offer to purchase said shares,

Now, Therefore, Be It Resolved, that the President of this corporation is hereby authorized to offer to purchase said one hundred forty (140) shares of the capital stock of this corporation from The Bank of California, N.A., as executor of the estate of Percy D. Denroche, deceased, for the sum of One Hundred Twenty Dollars (\$120.00) per share, said offer to be open for acceptance for a period of ten (10) days from the date of this resolution.

There being no further business to come before the meeting, the same on motion duly made and seconded, adjourned.

/s/ Dudley F. Miller,
Secretary

JOINT EXHIBIT No. 4-D

Minutes of Stated Meeting of Board of Directors of
Western Vegetable Oils Company Incorporated
October 18, 1949

Pursuant to the provisions of the By-Laws and notice thereof given to all of the Directors, the stated monthly meeting of the Board of Directors of Western Vegetable Oils Company Incorporated was held on October 18, 1949, at the hour of 2:00 o'clock p.m. at the office of the company, 24 California Street, San Francisco, California.

There were present the following Directors:

Adolph A. Schumann, Ralph J. Boomer, William A. Dow, Jr., Thos. A. Allan.

Also present: Dudley F. Miller, Secretary of the company.

The minutes of the meeting of September 20, 1949 were read and approved.

Mr. B. T. Rocca was not present, being absent on a trip to the Philippine Islands, but B. T. Rocca, Jr. appeared in his stead.

The President gave his report upon the condition of the company's business and presented balance sheets and position statements for the consideration of the Directors.

There was then presented to the meeting an offer from Pacific Vegetable Oil Corporation to sell to the company 1,346 of the shares of this company now owned by Pacific Vegetable Oil Corporation at a price of \$220.00 per share and an offer from Thos. A. Allan, one of the share holders of this

company, offering to sell to this company 140 of the shares of this company, being all of the stock of this company now owned by Thos. A. Allan, at a price of \$220.00 per share.

The Directors discussed these offers and discussed at length whether the financial position of this company would enable it to accept these offers. It appearing that accepting these offers would be to the advantage and best interests of the corporation, and that the financial condition of the corporation enabled it to accept such offers, the following resolution was moved, seconded and unanimously carried:

Whereas, Pacific Vegetable Oil Corporation is the owner of 2,050 shares of the capital stock of this corporation and has offered to sell to this corporation 1,346 of said shares at a price of \$220.00 per share, and

Whereas, Thos. A. Allan is the owner of 140 shares of the capital stock of this corporation and has offered to sell the same to this corporation at the sum of \$220.00 per share, and

Whereas, this corporation has an earned surplus sufficient to enable it to purchase said shares and the Directors of this corporation deem it to be to the best interests of this corporation to purchase said shares so offered,

Now, Therefore, Be It Resolved that the President of this corporation is hereby authorized to accept the offer of Pacific Vegetable Oil Corporation to sell to this corporation 1,346 shares of the capital stock of this corporation and the offer of Thos. A.

Allan to sell to this corporation 140 shares of the capital stock of this corporation at a price of \$220.00 per share, and the President and Secretary of this corporation are hereby authorized to take all steps necessary to consummate the purchase of said shares by this corporation.

The Directors next discussed the question of whether, upon the consummation of such purchase the shares so purchased should be held as Treasury shares or retired. The Secretary called the attention of the directors to the fact that certain other shares of this corporation's stock previously purchased by it at various times were still held as Treasury shares and had not yet been retired, these shares being 698 shares previously purchased from The Bank of California, N.A., as Trustee, under the Will of R. Carl Eddy, Jr., deceased, 140 shares purchased from the Estate of Percy C. Denroche, deceased, and 280 shares purchased from J. H. Thies. After some discussion, the following resolution was unanimously adopted:

Whereas, this corporation has heretofore purchased from The Bank of California, N.A., as Trustee under the Will of R. Carl Eddy, Jr., deceased, 698 shares of its capital stock; from the estate of Percy C. Denroche, 140 shares of its capital stock and from J. H. Thies 280 shares of its capital stock, and

Whereas, all of said shares have heretofore been held by the corporation as Treasury stock, and

Whereas, it appears to be to the advantage and best interest of the corporation that said stock be

retired and the certificates representing said shares cancelled.

Now, Therefore, It Is Hereby Resolved that all of said shares hereinabove mentioned be retired and the certificates representing the same cancelled and the President and the Secretary of this corporation are hereby authorized to take all steps necessary to such retirement and to the cancellation of the certificates representing said shares.

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

Whereas, this corporation has accepted the offer of Pacific Vegetable Oil Corporation to sell to this corporation 1,346 shares of its capital stock and the offer of Thos. A. Allan to sell to this corporation 140 shares of its capital stock, and

Whereas, it appears to be to the advantage and best interest that such stock be retired and the certificates representing said shares cancelled upon the consummation of the purchase of said shares.

Now, Therefore, Be It Resolved that upon the consummation of the purchase from Pacific Vegetable Oil Corporation of 1,346 shares of the capital stock of this corporation and the purchase from Thos. A. Allan of 140 shares of the capital stock of this corporation, said shares be retired and the certificates representing said shares cancelled, and the President and the Secretary of this corporation are hereby authorized to take such steps as may be necessary to accomplish said retirement and cancellation.

There being no further business to come before the meeting, the same on motion duly made and seconded, adjourned.

Dudley F. Miller,
Secretary

JOINT EXHIBIT No. 5-E

Minutes of Special Meeting of Board of Directors
of Western Vegetable Oils Company Incorporated
October 26, 1949

Pursuant to the call of the President and by consent of all Directors a special meeting of the Board of Directors of Western Vegetable Oils Company Incorporated was held on Wednesday, October 26, 1949 at the hour of 2:00 o'clock p.m. at the office of the company, 24 California Street, San Francisco, California.

There were present the following Directors:

Adolph A. Schumann, Ralph J. Boomer, William A. Dow, Jr., Thos. A. Allan, B. T. Rocca.

Also present: Dudley F. Miller, Secretary of the company.

The President stated that the purpose of the meeting was to consider certain additional offers from shareholders of the company to sell their stock to the company. He presented to the meeting an offer from Paul A. Schumann to sell to the company twenty-five (25) shares of the stock of this company now owned by him at a price of \$220.00 per share, and an offer from Freda Nelson to sell to

the company twenty five (25) shares of the stock of this company now owned by her at a price of \$220.00 per share. He stated further that he had been informed that Muriel D. Burness and Donald S. Burness intended to offer to sell to this company the shares of the stock of this company now owned by them, amounting to one hundred seventy-eight (178) shares each, at the price of \$220.00 per share, but that such offer had not yet been received by him. He further stated that these offers and prospective offers would cover all of the stock of this company owned by these persons.

The Directors discussed these offers with relation to the financial position of the company. It appeared that the company was in a financial position to accept the offers of Paul A. Schumann and Freda Nelson and would be in a position to accept the offers of Muriel D. Burness and Donald S. Burness if and when made, and it appeared further that it would be further to the advantage and best interests of this corporation to acquire said shares and to accept said offers. In consequence, the following resolution was moved, seconded and unanimously carried:

Whereas, Paul A. Schumann is the owner of twenty-five (25) shares of this corporation and has offered to sell the same to this corporation at the sum of Two Hundred Twenty Dollars (\$220.00) per share, and

Whereas, Freda Nelson is the owner of twenty-five (25) shares of this corporation and has offered to sell the same to this corporation at the sum of

Two Hundred Twenty Dollars (\$220.00) per share, and

Whereas, Muriel D. Burness is the owner of one hundred seventy-eight (178) shares of this corporation, and has indicated that she may offer to sell the same to this corporation at the sum of Two Hundred Twenty Dollars (\$220.00) per share, and

Whereas, Donald S. Burness is the owner of One Hundred Seventy Eight (178) shares of this corporation and has indicated that he may offer to sell the same to this corporation at the sum of Two Hundred Twenty Dollars (\$220.00) per share, and

Whereas, this corporation has an earned surplus sufficient to enable it to purchase said shares and the Directors of this corporation deem it to be to the best interests of this corporation to purchase said shares, and

Whereas, it appears to be to the advantage and best interests of this corporation that said shares of stock be retired when purchased, and the certificates representing said shares cancelled upon the consummation of the purchase of said shares, and

Now, Therefore, Be It Resolved, that the President of this corporation is hereby authorized to accept said offers of Paul A. Schumann and Freda Nelson to sell their said shares of the capital stock of this company at said price of Two Hundred Twenty Dollars (\$220.00) per share and is further authorized to accept any offer received by him from Muriel D. Burness and Donald S. Burness to sell their said shares of the capital stock of this corporation at a price of Two Hundred Twenty Dollars

(\$220.00) per share, and the President and Secretary of this corporation are hereby authorized to take all steps necessary to consummate the purchase of said shares by this corporation, and

Be It Further Resolved that upon the consummation of said purchase said shares so purchased be retired and the certificates representing said shares cancelled, and the President and Secretary of this corporation are hereby authorized to take such steps as may be necessary to accomplish said retirement and cancellation.

There being no further business to come before the meeting, the same on motion duly made and seconded, adjourned.

Dudley F. Miller,
Secretary

JOINT EXHIBIT No. 6-F

Minutes of Special Meeting of Board of Directors
of Western Vegetable Oils Company Incorporated
January 4, 1950

Pursuant to the provisions of the By-Laws and notice thereof given to all of the Directors, a special meeting of the Board of Directors of Western Vegetable Oils Company Incorporated was held on Wednesday, January 4, 1950 at the hour of 2:00 o'clock P.M. at the office of the company, 24 California Street, San Francisco, California.

There were present the following Directors:

Adolph A. Schumann
Ralph J. Boomer

William A. Dow, Jr.

Thos. A. Allan

B. T. Rocca

Also present: Dudley F. Miller, Secretary of the company.

The President stated that the purpose of the meeting was to consider an offer which he had received from William A. Dow, Jr. to sell to this corporation all of the stock owned by him in this corporation amounting to 900 shares at the same price at which the other share holders had previously offered their shares to the corporation, namely \$220.00 per share. Mr. Dow stated that he desired to dispose of his shareholding in this corporation so as to concentrate his attention upon the operation of S. L. Jones & Co. The Directors discussed this offer and examined the financial position of the company with respect to the acceptance of the offer. In the course of this discussion Mr. Boomer stated that it was his desire to offer to sell the shares of stock owned by him in this company in the amount of 250 shares at the same price, although he had not yet formally offered such stock to the corporation.

After an extended discussion the Directors concluded that the corporation was in the financial position to purchase said shares and that it would be to the advantage and best interests of the corporation to do so. Thereupon on motion duly made, seconded and unanimously carried, the following resolution was adopted:

Whereas, William A. Dow, Jr. is the owner of 900 shares of this corporation and has offered to sell the same to this corporation at the sum of \$220.00 per share, and

Whereas, Ralph J. Boomer is the owner of 250 shares of this corporation and has indicated that he intends to offer to sell the same to this corporation at the sum of \$220.00 per share, and

Whereas, this corporation has an earned surplus sufficient to enable it to purchase said shares and the Directors of this corporation deem it to be to the advantage and best interests of this corporation to purchase said shares, and

Whereas, it appears to be to the advantage and best interests of this corporation that said shares of stock be retired when purchased and the certificates representing said shares cancelled upon the consummation of the purchase of said shares,

Now, Therefore, Be It Resolved that the President of this corporation is hereby authorized to accept said offer of William A. Dow, Jr. to sell to this corporation his said shares of the capital stock of this corporation at said price of \$220.00 per share and he is further authorized to accept any offer made by Ralph J. Boomer to sell his said shares of the capital stock of this corporation at a price of \$220.00 per share, and the President and Secretary of this corporation are hereby authorized to take all steps necessary to consum-

mate the purchase of said shares by this corporation, and

Be It Further Resolved that upon the consummation of said purchase said shares so purchased be retired and the certificates representing said shares cancelled, and the President and Secretary of this corporation are hereby authorized to take such steps as may be necessary to accomplish said retirement and cancellation.

There being no further business to come before the meeting, the same on motion duly made and seconded, adjourned.

Dudley F. Miller
Secretary

JOINT EXHIBIT No. 7-G

Minutes of Stated Meeting of Board of Directors of
Western Vegetable Oils Company Incorporated
August 16, 1949

Pursuant to the provisions of the By-Laws and notice thereof given to all of the Directors, the stated monthly meeting of the Board of Directors of Western Vegetable Oils Company Incorporated was held on August 16, 1949, at the hour of 2:00 o'clock P.M. at the office of the company, 24 California Street, San Francisco, California.

There were present the following Directors:

Thos. A. Allan

Adolph A. Schumann

Ralph J. Boomer

William A. Dow, Jr.

B. T. Rocca

Also present: Dudley F. Miller, Secretary of the company.

The minutes of the meeting of July 19, 1949 were read and approved.

The President reported upon the company's financial position for the year and for the month ending July 31st. His report was examined and discussed by the Directors. The President stated that the profit position for July should be continued into August.

The Secretary reported upon the status of the dispute between this company and Southern Pacific Company over demurrage charges on copra cars, reporting that a formal complaint had been filed with the I.C.C. seeking a review of the correctness of the charges made by the Southern Pacific Company.

The Directors then discussed the matter of dividends. It appearing the company had sufficient net earnings at this time to warrant the payment of a dividend, the following resolution was unanimously adopted:

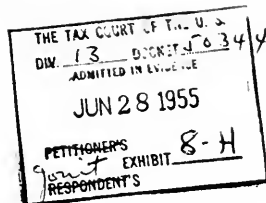
Whereas, the company at this time has net earnings and profits sufficient to pay a cash dividend of Ten Dollars (\$10.00) per share on the shares of the company now issued and outstanding, and

Whereas, it is the desire of this company that such dividend be paid,

Now, Therefore, Be It Resolved that a dividend of Ten Dollars (\$10.00) per share is hereby declared upon the shares of this company now issued and outstanding, said dividend to be payable to shareholders of record as of August 17, 1949.

There being no further business to come before the meeting, the same on motion duly made and seconded, adjourned.

Dudley F. Miller
Secretary



WESTERN VEGETABLE OILS COMPANY, INCORPORATED

SUMMARY ANALYSIS OF EARNED SURPLUS

		<u>Deductions</u>			<u>Increase or</u>
					<u>(Decrease)</u>
	<u>Income or</u>	<u>Taxes on</u>	<u>Dividends</u>	<u>Other</u>	<u>Earned</u>
	<u>(Loss)</u>	<u>Income</u>		<u>Adjustments</u>	<u>Surplus</u>
1935	\$ 9,427.84	\$ -	\$ -	\$ -	\$ 9,427.84
1936	75,074.59	1,215.08	69,300.00	-	4,559.51
1937	(49,602.88)	3,848.57	6,300.00	-	(59,751.45)
1938	(33,401.40)	-	-	(360.00)	(33,041.40)
1939	27,745.44	-	-	835.75	26,909.69
1940	(3,275.39)	4,522.34	-	(3,678.80)	(4,118.93)
1941	113,400.95	53,159.42	-	4,620.00	55,621.53
1942	26,024.20	6,962.93	-	-	19,061.27
1943	51,119.43	450.00	39,060.00	-	11,609.43
1944	65,152.50	38,596.21	11,760.00	15,168.85	(372.56)
1945	75,656.05	44,020.86	10,364.00	-	21,271.19
Totals	\$ 357,321.33	\$ 152,775.41	\$ 136,784.00	\$ 16,585.80	\$ 51,176.12
1946	344,858.23	137,115.08	51,820.00	-	✓ 155,923.15
1947	1,069,837.49	407,179.51	103,640.00	913.42	✓ 558,104.56
1948	88,415.66	33,658.07	51,820.00	(158.22)	✓ 3,095.81
			50,420.00)		
1949	366,416.03	143,445.99(1)	433,040.00) ?	4,052.88	✓ 264,542.84)
1950	(121,092.71)	348.16(2)	253,000.00	-	✓ 374,440.87)
Totals	\$ 2,105,756.03	\$ 874,522.22	\$ 1,080,524.00	\$ 21,393.88	\$ 129,315.93

(1) Amount paid in acquisition of 2,032 shares of stock charged to earned surplus.

(2) Amount paid in acquisition of 1,150 shares of stock charged to earned surplus.

EXHIBIT 8-H.

WESTERN VEGETABLE OILS CO., INC.

THE TAX COURT OF THE U. S.
DIV. 13 DOCKET 56344
ADMITTED IN FULL

JUN 28 1955

PETITIONER'S
EXHIBIT
RESPONDENT'S

COMPARATIVE BALANCE SHEETS FOR THE YEARS ENDED

DECEMBER 31, 1948 TO 1953, INCLUSIVE

	1948	1949	1950	1951	1952	1953
A S S E T S						
Cash	\$448,201.72	\$ 238,503.21	\$ 54,739.69	\$ 84,466.05	\$ 54,005.10	\$ 48,277.30
Notes and accounts receivable	94,136.61	351,821.28	46,315.00	149,985.35	193,387.33	224,172.57
Inventories	324,181.27	125,764.77	118,192.98	451,233.11	292,035.67	144,072.53
Depreciable assets	189,071.24	207,168.51	207,674.60	210,458.90	262,257.54	281,602.66
Reserve for depreciation	(102,398.28)	(118,663.84)	(134,373.24)	(144,177.03)	(165,835.27)	(185,568.43)
Land					15,000.00	15,000.00
Other assets	14,866.72	16,033.31	17,085.30	5,571.85	27,133.63	7,414.89
Corra advances		294,000.00				
	\$968,059.28	\$1,114,627.24	\$309,634.33	\$757,538.23	\$677,984.00	\$534,971.52
	=====	=====	=====	=====	=====	=====
L I A B I L I T I E S						
Accounts payable	\$ 31,960.16	\$ 341,196.43	\$ 45,786.83	\$342,179.20	\$ 94,261.66	\$ 52,013.26
Notes payable					246,700.00	204,500.00
Accrued expenses	2,751.41	1,934.42	3,141.57	2,467.67	6,908.52	4,213.54
Accrued Federal income taxes	33,658.07	136,349.59		48,277.65		
Capital stock	62,300.00	62,300.00	62,300.00	62,300.00	63,000.00	63,000.00
Paid-in surplus	69,090.00	69,090.00	69,090.00	69,090.00	68,390.00	68,390.00
Earned surplus	766,239.64	503,750.80	129,315.93	233,223.71	198,723.82	142,854.72
	\$968,059.28	\$1,114,627.24	\$309,634.33	\$757,538.23	\$777,984.00	\$534,971.52
	=====	=====	=====	=====	=====	=====



UNITED STATES
CORPORATION INCOME TAX RETURN
For Calendar Year 1949

1949

or fiscal year beginning, 1949, and ending, 1950

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

PACIFIC VEGETABLE OIL CORPORATION

62 TOWNSEND STREET

SAN FRANCISCO, CALIFORNIA

(City or town, postal zone number)

CALIFORNIA

(State)

Date incorporated 1-1-35 State or country CALIFORNIA

Principal business activity (See instruction N) VEGETABLE OIL PROCESSING

Business group code number 268
(From instruction N)Number of shares
of common stock

NET INCOME COMPUTATION

GROSS INCOME

1. Gross sales (where inventories are an income-determining factor)	Less: Returns and allowances	\$ 705,495	19
2. Less: Cost of goods sold. (From Schedule A)		58,315,900	45
3. Gross profit from sales		1,399,594	74
4. Gross receipts (where inventories are not an income-determining factor)			
5. Less: Cost of operations. (From Schedule B)			
6. Gross profit where inventories are not an income-determining factor			
7. Interest on loans, notes, mortgages, bonds, bank deposits, etc.		62,859	32
8. Interest on corporation bonds, etc.			
9. (a) Interest on United States savings bonds and Treasury bonds owned in excess of the principal amount of \$10,000 issued prior to March 1, 1941. (b) Interest on deposits of certain instrumentalities of the United States issued prior to March 1, 1941. (c) Interest on Treasury notes issued on or after December 1, 1940, and (d) interest on Treasury notes issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof.			
10. Rents		2,840	00
11. Royalties			
12. (a) Total net short-term capital gain, (or excess of net short-term capital gain over net long-term capital loss). (From Schedule C)			
(b) Total net long-term capital gain (or excess of net long-term capital gain over net short-term capital loss). (From Schedule C)		(8,751)	39
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D)		317,060	00
13. Dividends. (From Schedule E)		310,311	27
14. Other income. (State nature)	Schedule attached		
15. Total income in items 3, and 6 to 14, inclusive			2,075,943 94

DEDUCTIONS

16. Compensation of officers. (From Schedule F)	\$ 84,810	71
17. Salaries and wages (not deducted elsewhere)	175,897	68
18. Rent		
19. Repairs	2,248	50
20. Bad debts. (From Schedule G)	132,538	42
21. Interest	148,337	15
22. Taxes. (From Schedule H)	111,546	61
23. Contributions or gifts paid. (From Schedule I)	1,703	40
24. Losses by fire, storm, shipwreck, or other casualty, or theft. (Submit schedule)		
25. Depreciation. (From Schedule J)	77,144	93
26. Depletion of mines, oil and gas wells, timber, etc. (Submit schedule)		
27. Amortization of emergency facilities. (Submit schedule)		
28. Advertising	3,341	46
29. Amounts contributed under a pension, annuity, stock bonus, or profit-sharing plan, etc.	14,362	42
30. Other deductions authorized by law. (From Schedule K)	941,224	75
31. Total deductions in items 16 to 30, inclusive		1,700,033 03
32. Net income before net operating loss deduction on account of net operating loss carry-over (item 15 less item 31)		\$ 375,910 91
33. Less: Net operating loss deduction on account of net operating loss carry-over from two preceding years. (Submit statement)		
34. Net income		\$ 375,910 91

TOTAL INCOME TAX

35. Total income tax (line 13, para 3)	\$ 40,435	77
36. Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation		
37. Balance of income tax due		40,435 77

DECLARATION. (See instruction E)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, each for himself declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

H. S. Hansen, President
(President or other principal officer) (State title)

Arthur Andersen & Co., Treasurer
(Treasurer, Assistant Treasurer or Chief Accounting Officer) (State title)

CORPORATE SEAL

DECLARATION. (See instruction E)

I/we declare under the penalties of perjury that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

(Signature of person preparing the return)

Harrison H. Hansen

(Signature of person preparing the return)

Arthur Andersen & Co.

EXHIBIT II-K

1. Kind of Property (All buildings, other than land, are to be included in this column.)	2. Date Acquired	3. Cost or Other Basis (See instructions to line 3.)	4. Amount Paid for Improvements	5. Depreciation Allowed or Allowed to Others	6. Accumulated Depreciation	7. Fair Market Value	8. Adjusted Basis	9. Loss or Gain
Schedule attached								
Total (Enter on line 28, page 1)								

Schedule E—OTHER DEDUCTIONS. (See instruction 30)

TAX COMPUTATION. (See Tax Computation Instructions)

7. Net income (line 1, above).....		\$ 375,910	31
8. Less: Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of line 3 above, excluding from the computation certain dividends received on preferred stock of a public utility).....	\$ 269,501	00	
9. Dividends paid on certain preferred stock if taxpayer is a public utility.....		269,501	00
10. Surplus net income.....		\$ 106,409	31
11. Surplus. If amount on line 10 is:			
Not over \$25,000; enter 6 percent of line 10 (6 percent in case of a consolidated return).....			
Over \$25,000 but not over \$50,000; enter \$1,500 plus 22 percent of excess over \$25,000 (\$2,000 plus 24 percent of excess over \$25,000 in case of a consolidated return).....			\$ 14,897
Over \$50,000; enter 14 percent of amount on line 10 (16 percent in case of a consolidated return).....			
12. Total normal tax and surplus (line 6 plus line 11).....		\$ 40,435	77
13. Total tax (line 12, or line 28 of Schedule C).....		\$ 40,435	77

QUESTIONS



[Title of Tax Court and Cause.]

REPORTER'S TRANSCRIPT

Customs Courtroom 421, Appraiser's Building,
630 Sansome Street, San Francisco, California,
Tuesday, June 28, 1955.

(Met pursuant to notice.)

Before Honorable Marion J. Harron, Judge.

Appearances: Dudley F. Miller, Esq., 400 Montgomery Street, San Francisco, California, appearing for the Petitioner. Edward H. Boyle, Esq., (Honorable John Potts Barnes, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [1]*

The Clerk: Docket No. 50344, Pacific Vegetable Oil Corporation.

Mr. Miller: Dudley F. Miller appearing for the Petitioner.

Mr. Boyle: Edward H. Boyle for the Respondent.

The Court: Mr. Miller, I understand all the facts are stipulated. Are you going to offer the stipulation, or will Mr. Boyle?

Mr. Miller: Mr. Boyle and I have signed the stipulation, and I would like to offer the original at this time, with all exhibits attached and a duplicate without exhibits.

The Court: How many exhibits are there?

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Miller: Eleven, and they are numbered both numerically and alphabetically because they are joint exhibits.

The Court: Could you, on that original copy, just pull off the exhibits from the stipulation? I know they are referred to in the stipulation, but I will detach them and have them marked as exhibits for our convenience in working on the case.

Mr. Miller: Would you like to have them detached now?

The Court: Would you please?

The stipulation is received and made part of the record. There are exhibits attached to [2] the stipulation, and it is always a good procedure when we have time to ask counsel to say something about these exhibits. You know the interval of time that is required for one new mind, fresh on the subject, to absorb what other minds have taken a good deal of time to understand, and even though you intend to make all of these matters clear in your briefs, why, there is lacking when we read briefs that personal contact we can have with counsel when the case is presented.

Since there will be no testimony taken in the case, and we have a quiet courtroom, I thought we could use a little time to learn directly from counsel their respective views about these exhibits.

I see that the question relates to the propriety of a deduction of \$159,256.18 in 1949, in an account designated "Reserve for out-turn settlements," which account applies exclusively to contracts covering trans-copra shipments.

I take it that is the main issue in the case, and it appears as though we have one of the accounting problems in this case. Then there are some other issues presented. I take it the petitioner manufactured or processed vegetable oils; is that right?

Mr. Miller: That is right.

The Court: And it imports raw materials?

Mr. Miller: That is right.

The Court: From which it makes cocoanut [3] oil and other oils?

Mr. Miller: I would like to state to your Honor that the two issues are really of equal importance from the standpoint of the tax dollars involved.

The \$148,000 deficiency which appears in the petition is stated in the petition actually to involve only 112, due to the fact that there were about \$35,000 of admitted adjustments in the year, resulting primarily from adjustments for loss in first-out inventory to determine the issues and things of that character, so that the amount actually involved here in terms of deficiency is approximately \$112,000.

The first issue, which you have correctly stated, is an accounting issue almost exclusively. The second issue is an issue of the nature of which your Honor is undoubtedly familiar; the handling or treatment of inter-corporate stock actions as dividends or as capital gain.

Those two issues are in fact quite distinct because they are only related in the taxable way and taxpayer was in the same kind of business.

The Court: You go ahead and state what your position is under each of these issues. [4]

* * * * *

The Court: Now, Mr. Miller, what is the [47] next issue that we have to take up?

Opening Statement on Behalf of the Petitioner

Mr. Miller: The next issue is the issue which is entirely distinct from this one, the issue of the treatment of the purchase price, from the Petitioner's point of view, from the sales price of stock held in another corporation as dividend income as distinguished from capital gains income.

I would like to, with the Court's indulgence, make a one sentence statement with respect to the other issue before I pass to this. Our contention will be, and is, that what Petitioner did in connection with this so-called change of accounting practice was simply to follow the true accrual method of accounting more accurately than it had been doing before, and not to make a change in method at all.

That will be our contention, based, of course, upon the contention that when the cargo is shipped, all that we know we can get, all we know we are entitled to, is 95%. Whether we are entitled to more or whether we are required to make a refund to the purchaser is not at that time known, and therefore, not in our view accruable items.

The Court: Your point is that it was an error to accrue the 400% of the invoice price?

Mr. Miller: Yes.

The Court: For how many years had the taxpayer been doing that before 1949? [48]

Mr. Miller: I am sorry to say that I can't answer that positively, but I think for a considerable number of years, so far as I know, that had been the practice during the years subsequent to the end of the war.

The taxpayer was not extensively purely in the marketing side of copra prior to the war. It was at the end of the war when the Philippines were liberated that this business began in volume for the Petitioner.

The other issue, as I say, is one entirely distinct. In the stipulation of facts, the facts begin with Paragraph 4 and run on through to the end of the stipulation.

The first exhibit is not precisely an exhibit, but rather a tabulation which appears in Paragraph 5 of the statement of facts.

As background, the situation was this: Western Vegetable Oils Company, Inc., is another company which was in the copra business exclusively, or virtually exclusively from 1935 on until very recently; at the time that these transactions occurred in 1949, it was heavily engaged in the business.

At that time, the beginning of 1949, Paragraph 5 shows the shareholdings in the company, showing the Petitioner with somewhat in excess of 2,000 shares out of somewhat in excess of 5,000 shares of stock outstanding, representing 40% of stock in the company.

The other shareholders are likewise listed. [49]

In the course of 1949, particularly beginning with October, 1949, and from then until January 10, 1952, Western bought the shares of all of its shareholders in some degree or other except one. That tabulation is shown on page six. It purchased a portion of the shares owned by the Petitioner and all of the shares owned by all of its other shareholders except Mr. Scheumann, who is president of the company.

The paragraph continues to give further statistical data with respect to Western; namely, the book value of the shares during that period of time, which was \$220.

The Court: You have some exhibits here, 3-C to 8-F, which relate to the acquisition by Western?

Mr. Miller: I beg pardon: I was looking for that on the next page.

The Court: Western acquired from its shareholders some of its outstanding stock. What were the terms on which Western acquired some of the outstanding stocks from the stockholders?

Mr. Miller: Those terms were shown in those exhibits, your Honor.

The Court: Do you remember roughly what they were? Did they acquire them at the market price? Did the stock have a par value?

Mr. Miller: No.

The Court: What did they pay? [50]

Mr. Miller: Book value, \$220 per share.

The Court: As of December 31, 1948?

Mr. Miller: That is right. Those exhibits listed,

3-C to 6-F are the minutes, corporate minutes in which the stock——

The Court: We can go through this rather quickly. This is easy to grasp. Then later Western paid, or declared a dividend in 1949 of \$10 per share?

Mr. Miller: On August 16.

The Court: And distributed that.

Mr. Miller: And that is shown by an exhibit.

The Court: And what did the Commissioner determine with respect to this? In other words, the Petitioner received some money?

Mr. Miller: Yes.

The Court: From Western in 1949. How much did the Petitioner receive from Western in 1949?

Mr. Miller: The Petitioner received \$296,000.

The Court: And did it get \$296,000 for the stock it surrendered to Western?

Mr. Miller: Yes.

The Court: How much stock did it surrender?

Mr. Miller: 1,346 shares.

The Court: And at \$220 per share?

Mr. Miller: Yes. [51]

The Court: What did the Commissioner determine? How did the taxpayer first handle that in his return?

Mr. Miller: The taxpayer reported that in its return as dividend income.

The Court: Reported as dividend 296,000?

Mr. Miller: Yes.

The Court: Why?

Mr. Miller: And the Commissioner insisted upon a capital gains.

The Court: Isn't that unusual?

Mr. Miller: We didn't think so.

The Court: Didn't this entire affair have a basis for that?

Mr. Miller: Yes.

The Court: What was the basis?

Mr. Miller: I believe it was \$18,000—some.

The Court: How long has the Petitioner owned that stock?

Mr. Miller: For various years, beginning with 1935. It had acquired its total holdings of 2,096 over a period of time.

The Court: Well, Western was controlled by the Petitioner?

Mr. Miller: Yes.

The Court: It had 40% of the outstanding [52] stock, and a Scheumann had 24% of the outstanding stock; that takes care of 64, and S. L. Jones & Company had 17%. Now, those three were the largest stockholders?

Mr. Miller: Yes.

The Court: Other stockholders had stock ranging from 2 to 4%?

Mr. Miller: Yes.

The Court: Who was Scheumann?

Mr. Miller: Mr. Scheumann was president of Western.

The Court: Was he an officer of Petitioner?

Mr. Miller: At that time he was a director of Petitioner, I believe.

The Court: Why did the taxpayer report what it received from surrender of its stock? What is your theory now underlying your contention that the distribution is one of dividend?

Mr. Miller: Our theory is that these distributions, and in particular, of course, the distribution made of Petitioner has the net effect of a dividend.

The Court: Why? You are just stating your conclusions. You aren't stating your theory.

Mr. Miller: Well, I am sorry. I thought you meant what our position was.

The Court: No; why did you take that position?

Mr. Miller: Our theory is, as is again [53] illustrated in the exhibits and other statements, that Western had, at the time these distributions were made, very substantial earned surplus, accumulated over the years.

The Court: Is that shown in your stipulation?

Mr. Miller: Yes, it is. I will refer to that exhibit. Statement of earned surplus is——

The Court: Are you going on the definition that any distribution out of, any distribution of dividends out of earnings?

Mr. Miller: No; we are going upon the basis that, first, due to the fact that Petitioner retains substantial shareholdings; secondly, that Western had very substantial earned surplus, very substantial cash reserves at that time, built up over the years, made this distribution, and the others, thereby distributing earned surplus, did not contract itself in its business, or change its business in any way as, again, we believe——

The Court: You are taking an awful lot of time, Mr. Miller, if you will excuse me, to get down to a point of some kind under some tax decisions. Have we held that where all stockholders turn in their stock in exactly the same proportion that there is no change at all, some result in that distribution?

That has to do with tax free reorganization. I don't see what your point is here. Ordinarily, when stock is [54] surrendered, the corporation capital account is reduced. There is no longer a certain amount of outstanding stock and a reduction of the capital account must mean a return of capital to stockholders, and if it gets any more basis under that capital, he realizes capital gains.

Offhand, it would seem that the Respondent's determination was a normal, usual determination and that the taxpayer's position was abnormal.

Mr. Miller: I think the position of the Commissioner is a position which he quite often takes when he will get a little more tax that way, but in this case, he gets less because of the application of the 85% credit; without that, of course, the Commissioner would collect more dollars, more than he would with the other.

We are relying upon our interpretation of Section 115(g).

The Court: What cases are you relying on?

Mr. Miller: We are relying on, among others, Boyle vs. Commissioner. We will be——

The Court: What citation?

Mr. Miller: 187 Fed. 2, 557. Upon Flanagan vs. Halvering, 116 Fed. 2, 937; Fostoria Glass Com-

pany vs. York in 45 Fed. Supplement 962; on United National Corporation, 2 Tax Court 111, and upon Pullman, Inc. vs. Commissioner, 8 Tax Court 292, and upon Forhan vs. Commissioner in 75 Fed. 2, 268; and [55] Reihnstram, 125 Fed. 2d., 790.

There are one or two others as well. Carter Tiffany, 16 Tax Court, 176. In fact, the Boyle and Tiffany cases are a different side of the shield. And Vassely vs. Commissioner in 331, U.S. 737.

The Court: I suppose that is about all you need to go into on that, isn't it? You have the facts stipulated.

Mr. Miller: I think so, yes.

The Court: Mr. Boyle, do you want to say anything about that?

Mr. Miller: May I add one thing? As far as the exhibits go, Exhibit 9-I and 10-J are statements, are comparative balance sheets, statements of income for Western again showing factual bases or what we conceive to be a factual basis for our contention.

The Court: Mr. Boyle?

Opening Statement on Behalf of the Respondent.

Mr. Boyle: The Commissioner's position is that on the form of this there was a partial liquidation; they were dealing at arm's length. The assets were reduced approximately 60%. The working capital was practically eliminated; 7 of the 9 stockholders were completely eliminated. There was no rateable distribution.

Normally, 115-C would apply. Of course, the Commissioner can look to substance over form. In

this case the [56] position is turned. The taxpayer is ignoring the form and saying that the substance of it is a distribution in the nature of a dividend, since it is the equivalent to a dividend. Of course, he has the burden of showing the unusual circumstances that make that so.

115-G normally is a loophole provision; it is to prevent partial distribution, or prevent the argument that dividends are actually partial distributions, to prevent the guise of a partial distribution.

The Court: Prevent a distribution of dividends under the guise of a partial liquidation, is that what you are trying to say?

Mr. Boyle: That is a much better way of saying it; that is true. Of course, here the taxpayer is using that same provision and the Commissioner doesn't believe that it is established under the facts of this particular distribution, that these were dividends.

The Court: What cases are you going to rely on, do you know yet?

Mr. Boyle: Well, going back to some old ones; Salt Lake Hardware, 27 BTA 482; Palmetto, 30 BTA, 544; Pullman, Inc. vs. Commissioner, 2 TC 292.

Of course, it is submitted that the facts of each particular case will determine this issue. In fact, that is even more important than the intent, or the motives as in the [57] case of Flanagan vs. Halvering, which the Petitioner has cited, it was held that the net effect of the distribution rather than the moves or motives of the taxpayer or its corporation

is the fundamental question in administering Section 115-G.

The Court: Are you really in agreement on the facts under this, or are you going to ask the Court to interpret your exhibits and draw conclusions from them, and in that way resolve some differences of opinion between you as to what the facts are?

Mr. Boyle: Well, the only fact that we concede that was not put in, your Honor——

The Court: That doesn't answer my question now.

Mr. Boyle: Yes; the answer to that is in the affirmative. We are asking you to pass upon it as submitted.

The Court: I am not sure you understand this. Supposing you had not stipulated your facts on this? Supposing you had agreed that there could be received in evidence without the formalities of identification and all of that, certain statements showing the financial position of Western, and so forth, but the issue was going to be tried, the taxpayer would call a witness to the stand and he would ask the witness why this distribution was made, why Western wanted to acquire a certain amount of the outstanding stock, why did they adopt a resolution at that time, a resolution that doesn't say very [58] much but it gives you the net result of a decision; a proposal is made, a resolution is proposed, and adopted, and you don't get very much of the real background of the situation from reading a corporate resolution.

You look at the balance sheet of a corporation

and it shows you what your surplus is, what the capital is, and so forth. Well, what do you want me to do with this issue? You come in and say you have stipulated the facts, and Mr. Boyle tells the Court that intent is important here; it is a fact. If you were agreed upon the facts, you wouldn't have a question before the Court to decide, would you?

Mr. Boyle: We might very well have a question, yes.

The Court: Why?

Mr. Boyle: What is the law under those facts, or pursuant to those facts?

The Court: Where do you differ in your views about what the facts are?

Mr. Boyle: Of course, the Commissioner comes here, maybe relying erroneously on his *prima facie* case. The burden is on the Petitioner to overcome the normal presumptions of 115-C and G, and certainly the possibility of having corporate officers testify has been discussed.

The Petitioner apparently doesn't feel it necessary and the Respondent doesn't wish to broaden the record beyond what is permissible under the circumstances by relating what [59] he found, but it was willing to do so.

The Court: So that is it. You are going to argue that the taxpayer hasn't met his burden of proof?

Mr. Boyle: That is true; that the form of this is a partial distribution, and that unless unusual circumstances make it otherwise, it is a 115-C distribution, partial liquidation.

The Court: Have you your Code here?

Mr. Boyle: I have the old Code, your Honor.

The Court: Could I see that a moment, please?

That deals with distribution and liquidation, and it is the Commissioner's determination that these were distributions in partial liquidation?

Mr. Boyle: That is 115-C; and 115-I tells what is a partial.

The Court: 115-I defines a partial liquidation, and that means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or reduction, redemption of part of its stock.

Mr. Miller, what did Western cancel or redeem this stock that was turned in? What did it do with the stock?

Mr. Miller: As to all stock that was turned in, whether it represented all of the stock owned by shareholders or only a portion, was the case of Petitioner, the stock was [60] cancelled.

The Court: So then 115-G says that "If the corporation cancels or redeems stock at such time and in such manner as to make the distribution and cancellation in whole or in part, essentially the equivalent of the distribution of the taxable dividend, the amount so distributed and redemption or cancellation of the stock shall be treated as dividend to the extent that it represents a distribution of earnings or profit accumulated after February 28, 1913."

Mr. Miller: Yes.

The Court: So you are going to take the position, are you, that this was essentially the equivalent of a distribution of a taxable dividend because the corporation had a large amount of accumulated earnings and profits; is that right?

Mr. Miller: Because it did not actually liquidate its affairs, as the stipulated facts show.

The Court: What do the stipulated facts show about that?

Mr. Miller: In Paragraph 7 of the stipulation of facts, at least not in the form of an exhibit, but in the form of a portion of a paragraph, it shows the corporations' activities in the crushing of copra and other materials, going back from 1942 up to 1953.

The Court: It is still in existence?

Mr. Miller: Yes, it is. [61]

The Court: Has it issued any more of its stock; does it have any different stockholders?

Mr. Miller: No.

The Court: All right; I guess that is about all, Mr. Boyle, is that right? Do you have anything else you want to say on this?

Mr. Boyle: No.

The Court: Now, Mr. Miller, would you like to call your witness? We will hear him on that first issue.

Whereupon,

HARRISON H. SIMPSON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Harrison H. Simpson.)

The Clerk: State your name, please?

The Witness: Harrison H. Simpson.

Direct Examination

Q. (By Mr. Miller): What is your address?

A. 405 Montgomery Street, San Francisco.

Q. Mr. Simpson, you are a tax manager for Arthur Anderson & Company? A. I am.

Q. Certified public accountant? A. Yes.

Q. In that capacity, you have prepared the income tax [62] return for the Petitioner for 1949?

A. I did.

Q. You were acquainted with all the calculations contained therein? A. I am.

Q. And you participated in conferences with the agents of the Department of Internal Revenue and examined tax returns? A. I did.

Q. Are you acquainted with an exhibit marked Exhibit 2-C?

The Court: 2-B, Mr. Miller.

Q. (By Mr. Miller): I beg pardon; Exhibit 2-B? A. I am.

Q. Would you explain to the Court with reference to that exhibit the relationship of Columns B, C, E and F?

A. Column B represents the total amount which the Petitioner would receive under the indicated invoices if the shipments to which they apply out-turn exactly as they were shipped; if the weights were identical at the out-turn point as they were at the shipment point, the Petitioner would realize the

(Testimony of Harrison H. Simpson.)

sum stated under Column B on the invoices listed.

Under Column C is listed the five per cent which the Petitioner can't get until the out-turn has been received, and can get only then if the out-turned weights equal the ship [63] weights which they very rarely do.

I think probably the easiest way to see this is to take these figures under Column C, which indicates the amount which the Petitioner may possibly get at some later date on shipments which are presently in transit, or at least not out-turned by December 31, 1949.

If the out-turn weights are identical with the ship weights, the Petitioner would then collect the amounts listed under Column C. If they out-turn more than the ship weights, a possibility but not a probability, they would collect more than 537, or more than the amounts listed under C.

If the out-turned weights are less than the ship weights they will not collect that amount; they will collect something less, or they may even have to refund. To take an example, the shipment of October 19, which was a very fine shipment—it out-turned almost on the nose. The taxpayer collected \$440 out of a possible \$537. There was very little loss.

The \$96 under Column F indicates a loss in value from the shrinkage during the shipment, a very slight loss. The taxpayer had actually collected under his 95% arrangement the difference between Columns B and C, and then subsequently collected the other \$440 because the out-turn was good.

(Testimony of Harrison H. Simpson.)

The next item down was a very poor shipment as far as the out-turn weights go. There not only did the taxpayer not collect the \$17,000-odd amounts listed under Column C, but it [64] had to refund 9,200-odd dollars because the out-turned weights were less than 95% of the ship weights.

Under Column C, you have possible collections; they are improbable. I would say they were very contingent, and as indicated here, the percentage that they will collect of the amounts in Column C are very low. In this case it comes to 6.5% of the 5% reserve ultimately collected.

Mr. Miller: Does your Honor have any other questions on that exhibit?

The Court: I think it is a fair statement, and a succinct one, to say that shrinkage during shipment represent a loss to the taxpayer?

A. That is correct, your Honor.

Q. He can ship \$50,000 worth of copra; if upon turn-out or out-turn of the copra, the pound weight is only equivalent to \$45,000, he has lost \$5,000 in shipment per invoice price?

A. I think that is a correct statement, your Honor, to say that the Petitioner bears the loss to shrinkage in shipment.

Q. In terms of accounting, its another matter, isn't it? He sets up on his books an account receivable for an invoice job, doesn't he? A. Yes.

Q. And the buyer, that is, accounts receivable from X, the amount of \$50,000, it is set up on your books as an account [65] receivable of \$50,000, or

(Testimony of Harrison H. Simpson.)

it used to be, at any rate; because of shrinkage the Petitioner doesn't expect to collect the full amount of that account receivable?

A. That is right.

Q. And frequently doesn't?

A. That is right.

Q. And there has to be a later adjustment?

A. That is right.

Q. Let me ask you this: How long have you been doing your accounting work for the Petitioner?

A. Since 1949; that was our first year.

Q. When you went in—what is the name of your firm? A. Arthur Anderson & Company.

Q. When Arthur Anderson went in, did they ascertain for how many years prior to 1949 the Petitioner had been setting up the full amount of these invoices as accounts receivable on the books?

A. No, we did not. We did ascertain that there had been a method of accounting that had been adjusted. It was done before we made our audit by the company's accountants themselves.

Q. The one that we have reference to here, this change in accounting— A. Yes.

Q. —that had already been done by the time you went in? [66] A. It had.

Q. So the question here, as I understand it, is under an accrual method of accounting under these circumstances, how much should you set up as your accounts receivable?

A. Yes, your Honor. We would say as accountants—and we would take an affirmative position

(Testimony of Harrison H. Simpson.)

upon this in so far as our statements would go to the public or to bankers or stockholders—that the only amount that the corporation should properly record is its sales income, which would be the 100% less 5, the amount that they have a firm claim for they can enforce payment for that amount, only that amount, until subsequent events will determine under this five per cent reserve.

Q. Well, that out-turn adjustment, I don't know whether this is covered in your exhibits or not—I guess it is. Exhibit 1-A is the sales contract, and in the sales contract, there would be some clause that would relate to an out-turn adjustment?

A. There is, the last clause.

Q. And you would regard this as being something like an accrual problem where there is some litigation; until the rights of the parties have been determined by the litigation, so there is uncertainty?

A. Yes, your Honor.

Q. And in this case until the goods have arrived and they find out what the out-turn adjustment is, is uncertainty? [67]

A. Very distinct uncertainty; it is unknown and unascertainable.

The Court: All right; anything else?

Mr. Boyle: I would like to ask a question.

Cross Examination

Q. (By Mr. Boyle): Of course, the five per cent is merely an approximation? A. Yes.

Q. Sometimes the shipment, when it out-turns,

(Testimony of Harrison H. Simpson.)

has less than 95% as well as more than 95% invoice price; is that right, Mr. Simpson?

A. Yes.

Q. In 1948, do you recall approximately how many dollars they had in transit in the year involved in copra? A. I don't recall.

Q. Was it about one-tenth of what they had at the end of 1949? Would the figure \$18,000 indicate to you—which was the amount deducted as an expense in the Spring of 1949—indicate to you the approximate amount of dollars of copra in shipment at the end of 1948?

A. You could approximate it from that figure, if the history was the same and it wasn't changed sharply. You would multiply that figure by 16 or 18 to get your total amount in the reserve. [68]

Q. When you came into the picture in 1949, had someone already set up this reserve out-turn settlement theory? A. Yes.

Q. Who had done that?

A. I believe it was Mr. Frehoe who was then controller of the Petitioner, who was primarily responsible for this change.

Q. That is, the accounts of Arthur Anderson didn't initiate this? A. We didn't.

Q. When did you come into it?

A. I think our first work was performed in December that year, preliminary to the audit which would be completed after the end of the year.

Q. Then your conclusion is that the five per cent reserve merely constitutes a closer approxima-

(Testimony of Harrison H. Simpson.)

tion of what the future holds than the old method?

A. There are good accounting reasons why you put that 100% in the invoice price into an account receivable; there it would be very poor accounting to put on any statement that that account receivable is good because the buyer has no liability to pay it, so on any proper reporting we subtract from that account receivable a total amount, the total amount of this reserve and that is a true account receivable because those are amounts that the Petitioner [69] has a direct claim against some buyers to collect.

Q. Isn't it true that you must make an explanation in your statements, which are five per cent, just as they did under the old method?

The Court: May I answer the question? I would like to call your attention to something. Did you get the question?

The Witness: No. Our accounts receivable will be net of those two figures; this 100% figure is sort of a memo account. Our true accounts receivable there would be no comment or anything. You would subtract from that the amount of the reserve and that is the account receivable item which would be reported on the statements with no further comment.

Q. (By Mr. Boyle): Did you not say under the old method to draw statements at the end of the year produced an erroneous impression because the accounts receivable was overstated? A. Yes.

(Testimony of Harrison H. Simpson.)

Q. And also the sales income was overstated?

A. Yes.

Q. The second question then is that under the method followed after 1949 with the five per cent reserve, is it not true that since that doesn't constitute the exact figures that will ultimately prevail, that that too is reflected on the statements at the end of the year and may produce an erroneous impression? [70]

A. The figure we have on this statement at the end of the year is firm. There may subsequently be, because of the out-turn, be an adjustment which we don't know at the end of the year, and which will be accounted for at the time it becomes knowable. At the end of the year I would say our accounts receivable under the present method is a firm figure; it is a good one.

Q. It is an approximation? The old one was, although it may be a better one?

A. No, sir.

Q. (By the Court): You are talking about the five per cent figure is a firm figure?

A. Yes, your Honor.

Q. And Mr. Boyle is talking about the old figure being the 100% figure? A. Yes.

The Court: Let me tell you something that occurs to me that I think is rather fundamental, and I would like to have you get at this right away.

It is agreed that Exhibit 1-A is the standard copra sales contract. It is quite an abbreviated contract. It has this over in the left-hand margin;

(Testimony of Harrison H. Simpson.)

it says under quality, Rule 100, "The clause pertaining to moisture doesn't apply."

There is another topic, "Weight analysis and [71] sampling; certified landed weight. Seller's"—I don't understand that apostrophe; does it mean plural?—"reserve the right to have their representatives present at the time of discharge."

In that quotation we have to put sic "cost of weighing for the buyers in town." This is all by telegram. Not one unnecessary word. "Analysis by independent CEBU or Manila Laboratory of official samples taken at time of loading shall be final. Cost of sampling and analysis to be borne by seller. Rules 40 and 102 of the National Institute of Oil Seed Products don't apply."

Paragraph two: "Copra is the meat of cocoanut," and so forth. "Drying process to remove all the moisture. It therefore is a common practice in the trade to sell copra on landed weight basis. Under contract terms and conditions providing for the payment of the major portion of the purchase price, normally 95% of the invoice value of the weight shipped as shown by the bill of lading, upon receipt by the buyer of the bill of lading invoice, and other shipping documents, and for the payment of a balance at invoice price which may be due upon the arrival of the copra at destination and the final determination of landed weights."

Now, Paragraph 2 of the stipulation is an agreed statement of custom in the trade. Mr. Miller, when we go to read cases involving whether you should

(Testimony of Harrison H. Simpson.)

[72] accrue something, and what amount you would accrue, we run into this principle that you must accrue the amount as of a certain day, the right to which has become fixed and certain.

I would like to know whether you have anything in the nature of a contract which indicates what the fixed liability of the purchaser was at the time when the transaction was accrued as accounts receivable. What would you look to under the standard that is established in these accrual accounting cases? What would you look to as the fact that fixes the liability of a certain amount at a certain time?

Mr. Miller: You would look at that contract.

The Court: But what would anybody except someone in the trade get out of this contract, because the contract is written in abbreviated form; it refers to outside rules.

Mr. Miller: May I interrupt your Honor there? We didn't see fit to attach a copy of the rule. We could easily do so but it would only clutter the record.

The Court: Is there any rule that says anything about this?

Mr. Miller: No; not on the phase of the matter with which your Honor is now concerned.

The Court: All right; let me tell you something, Mr. Miller. You have got the Respondent to enter into a stipulation about a practice of out-turn weight and you have got the Respondent to stipu-

(Testimony of Harrison H. Simpson.)

late that normally 95% of the [73] invoice value—I want to go back.

I want to quote to you from the stipulation:

“It is therefore a common practice in the copra trade to sell copra on a landed weight basis; i.e., under contract terms and conditions.”—Mind you, under contract terms—“providing for the payment of the major portion of the contract price, normally 95% of the invoice price upon receipt by the buyer of the bill of lading invoice and other shipping documents.”

The stipulation refers to an actual practice, and the Respondent has been willing to agree with you on that point. Therefore, you have not called witnesses to testify that that is the common practice.

Mr. Miller: That is true.

The Court: And I am to take that stipulation as being just the equivalent to what your witnesses would say if they were called to testify; is that right?

Mr. Miller: That is right.

The Court: And the practice is one that has grown up in the trade, and it is not provided in these contracts themselves that 95% of the invoice price is to be paid—where is that provided?

Mr. Miller: I don't have it here. Next to the last, under “payment.”

The Court: “Payment by the sight draft against first presentation for 95% of invoice value.” [74]

Q. (By the Court): Now, Mr. Witness, is it your understanding that the reason why the ac-

tember 19, and the reply briefs, simultaneous briefs to be due on October 21, and that will allow you extra time for reply briefs for mailing. I think simultaneous briefs should be filed in this case.

Is that satisfactory?

Mr. Boyle: It is for the respondent.

Mr. Miller: Quite satisfactory.

The Court: I believe this is the only case you have on the calendar that you have to prepare a brief in, Mr. Boyle, is that right?

Mr. Boyle: No, your Honor. I have two more.

The Court: On this calendar?

Mr. Boyle: Yes.

The Court: That means your briefs will all be due about the same time.

Mr. Boyle: They will if they are all set at the same time unless there is some extension.

The Court: What I have done, your original [77] brief normally would be due around September 12, and I have allowed two weeks extra time. You can file your brief before the time is due if you want to.

Mr. Boyle: You are asking for simultaneous briefs though?

The Court: Yes; but you can file your brief before it is due. You don't have to wait until the due date.

Mr. Boyle: Our Washington office never will, though. If we get it in there they hold it for some reason.

The Court: There are a lot of things about this system that I don't understand. Our office won't

serve briefs. I tell them to serve all briefs in my cases as soon as they are received. I don't care whether one party gets a brief in a little earlier than the other.

Thank you very much. That concludes the hearing of this matter, and I have accomplished a lot, in my understanding of the case, by having you spend so much time with me today and also I have enjoyed going over it with you.

(Thereupon, at 5:15 o'clock, the hearing in the above-entitled matter was concluded.) [78]

[Endorsed]: T. C. U. S. Filed July 13, 1955.

26 T. C. No. 1

Docket No. 50344

The Tax Court of the United States

Pacific Vegetable Oil Corporation, Petitioner, v.
Commissioner of Internal Revenue, Respondent

Filed April 5, 1956

FINDINGS OF FACT AND OPINION

Issue 1: Held: The revision effected by petitioner in 1949 to reflect contract sales accounts under which 95 per cent payments had been made in 1949 and for which contingent adjustments might be made in 1950 upon the determination in 1950 of certain facts constituted a change in its accrual

method of accounting for which prior consent of the Commissioner was required. Held, further, that respondent's action in rejecting the change and his requirement that the method of accounting employed by petitioner prior to 1949 be continued, is not proven to be arbitrary or an abuse of the Commissioner's discretion.

Issue 2: Petitioner owned 2,094 shares of common stock, out of 5,182 shares, the only class of issued stock of Western Vegetable Oils Co. In 1949, Western acquired for cash, 1,346 shares of stock owned by petitioner, and, also, all of the stock owned by some stockholders. All of the stock acquired was cancelled and retired by Western. Held: The distribution of Western in cancellation of stock held by petitioner was not essentially equivalent to the distribution of a taxable dividend within the meaning of section 115(g) of the 1939 Code but was taxable as provided in section 115(c).

Dudley F. Miller, Esq., for the petitioner.

Edward H. Boyle, Esq., for the respondent.

The Commissioner determined a deficiency in income tax for the year 1949 in the amount of \$148,867.81. The petitioner concedes that some of the Commissioner's adjustments are correct so that there is a deficiency of about \$35,907.31. The remaining deficiency of \$112,960.50 is in dispute. There are two issues to be decided, as follows:

(1) Whether the petitioner's adoption, in 1949, of a new system of accounting for sales of copra which were in transit at the end of the year so as to include in gross income only 95 per cent of the

contract price and to carry in a reserve for future, contingent adjustments in contract price 5 per cent, constituted a change in petitioner's accrual method of accounting which required prior consent of the Commissioner.

(2) Whether a cash distribution in 1949 to petitioner by another corporation in cancellation and redemption of part of the stock held by petitioner is essentially equivalent to the distribution of a taxable dividend within the meaning of section 115(g) of the 1939 Code, or was a distribution in partial liquidation taxable as provided in section 115(c).

Findings of Fact

The petitioner filed its return for 1949 with the collector for the first district of California in San Francisco.

Issue 1: Petitioner is a California corporation having its principal place of business in San Francisco. It keeps its books and makes its income tax returns on an accrual method of accounting and on the basis of a calendar year.

Petitioner is engaged in the business of manufacturing, processing, handling, and dealing in vegetable oil raw materials and vegetable oils in the United States and elsewhere in the world. One raw material in which it deals is copra, the meat of coconuts, from which coconut oil is manufactured. As part of its business operations, petitioner purchases copra rather extensively. Some of the copra which petitioner buys, it imports into the United States for the purpose of crushing into oil. The

issue in this proceeding does not relate to such purchases. Petitioner purchases a large quantity of copra in the Philippine Islands and sells and ships such purchases to purchasers in Europe, Latin America, and elsewhere. Those purchases do not enter the United States. The issue to be decided relates to these purchases and sales of copra.

Prior to shipment, in the producing areas in the Philippine Islands, copra, the raw material, is removed from the coconut shell and is either sun-dried, smoke-dried, or kiln-dried. During shipment there is usually loss of moisture and a resulting loss of weight of the copra, but sometimes there is a taking on of moisture if there is sweating and condensation of moisture in the hold of a ship, or there may be but a slight change in the weight of the bulk copra during transit to the point of delivery. This condition has given rise to a practice in the trade of comparing the weight of bulk copra at the time of unloading at the destination of the shipment with the weight at the time of loading at the point from which copra is shipped. The weight of copra at the point of destination is called the landed weight or outturn weight.

During 1949, and in prior years, petitioner sold and shipped large quantities of copra from the Philippines to buyers in Europe, Latin America, and other places outside the United States. The following contract is typical of the form of contract which petitioner and its customers used during 1949 and prior years:

Copra Sales Contract

Clause Paramount: This contract is subject to the published Trading Rules of the National Institute of Oilseed Products adopted and now in force, which rules are hereby made a part hereof to the same extent as if set forth in full herein, except insofar as such Rules conflict with any of the following terms of this Contract, in which event the said following terms shall govern. Any dispute arising under or resulting from this contract or under modification thereof shall be settled by Arbitration in accordance with the Rules of the National Institute of Oilseed Products in effect at the contract date.

Buyer: H. M. F. Faure & Co., Ltd., London, E. C. 3, England.

Seller: Pacific Vegetable Oil Corporation, San Francisco, California.

Commodity: Philippine Copra.

Quantity: Five hundred and fifty (550) long tons of 2,240-lbs. per ton; 5% more or less.

Quality: Rule 100. The clause pertaining to moisture does not apply.

Packing: In bulk.

Shipment: August/September, 1951. Seller's vessel.

Weights, Analysis & Sampling: Certified landed weights. Sellers reserve the right to have their representatives present at time of discharge. Cost of weighing for buyer's account. Analysis by an inde-

pendent Cebu or Manila laboratory of official samples taken at time of loading shall be final. Cost of sampling and analysis to be borne by seller. Rules 40, and 102 of the National Institute of Oilseed Products do not apply.

Insurance: Marine, usual W. A. 3% terms, warehouse to warehouse, for 110% of invoice value based upon ship weights, to be arranged and paid for by Seller. War Risk Insurance in excess of one-half percent for buyer's account.

Price: Two hundred and fourteen dollars (\$214.00) U. S. Dollars per ton of 2,240-lbs., C.I.F. Rotterdam.

Payment: By Sight Draft against first presentation of shipping documents, for 95% of invoice value. Final settlement to be made when outturn weights established. Bank collecting charges for seller's account.

Taxes: Any tax or other governmental charge hereafter imposed by any governmental authority upon the production, sale and/or shipment of goods sold hereunder shall be for buyer's account.

Force Majeure: Per Rule 56 of the Rules of the National Institute of Oilseed Products.

Special Conditions: Buyer guarantees that Import Permits are in hand.

This contract shall be deemed to be made and performed in California and is to be governed by the laws thereof.

Both buyer and seller hereby certify that they are familiar with and have access to copies of the

published Trading Rules of the National Institute of Oilseed Products adopted and now in force.

H. M. F. Faure & Co., Ltd.,

(Buyer)

Pacific Vegetable Oil Corporation

(Seller)

Thru: Zimmerman Alderson Carr Co., SF SFZ-3888.

Under a copra sales contract, such as the one set forth above, the quantity covered by the contract is the number of tons specified in the contract (550 long tons, in the above contract), "5% more or less," which latter clause constitutes the provision for determining the landed, or outturn, weight; and the invoice value is the amount of the contract weight times the stated price per ton. For example, under the above contract, the invoice value was \$117,700. The contract-invoice weight is called the "shipped weight." Also, under the copra sales contract which petitioner used, the initial payment of the buyer was 95 per cent of the invoice value, which amount was paid under a sight draft before the shipment reached its destination, and the final settlement was made after the unloading of the shipment and the determination of the outturn, or landed weight. Under the above contract, the initial 95 per cent payment amounted to \$111,815, and after the unloading of the shipment, if the outturn weight was more than 95 per cent of the shipped weight, i.e., weight at the time of shipment, the buyer would then pay petitioner the bal-

ance of the amount due over and above the initial 95 per cent payment. Or, if the outturn weight proved to be less than 95 per cent of the shipped weight, petitioner would make a refund to the buyer of the part of the initial payment which proved to be excessive. This custom of adjusting the final payment for a shipment on the basis of the outturn, or landed, weight gives rise to the description, "selling on a landed weight basis." Since the determination of the landed weight cannot be made until transit is completed, the final payment by the buyer is not made until about 60 days after the date of shipment.

Another way of describing the custom of selling on a landed weight basis is that the invoice price, which is computed at the time of the shipment, is adjusted at the end of transit, upon delivery, to the landed weight value, at which time the seller either collects an additional payment from, or makes a refund out of the initial payment, to the buyer.

The initial payments to petitioner under its executed sales contracts were brought about in the following way: Soon after shipment, the bill of lading, the invoice, and other papers were mailed to a bank together with a sight draft for 95 per cent of the invoice price. Such papers were received and the sight draft was paid by the buyer before the shipment of copra arrived at its destination.

Many of petitioner's shipments of copra are received and the landed weights are determined during and before the end of the year in which ship-

ment is made. The record in this proceeding does not show the volume or amounts of such sales.

Some of petitioner's shipments of copra begin during October and November, but either they do not reach their destination before the end of the year, or the landed weights are not determined before the end of the year. (The issue in this proceeding relates to such shipments and the contracts therefor.) Instead, the deliveries are made, or the landed weights are determined after the close of the year in which transit starts. Usually the landed weights of such shipments are determined in the year next following the year of the shipment. With respect to such shipments, petitioner may receive and in many instances does receive the initial 95 per cent payment under the copra sales contract before the end of the year in which transit of the shipment began, and the final adjustments in the amounts of the contract price are made in the next succeeding year.

During the taxable year 1949, chiefly during the months of October, November, and December, petitioner made shipments from the Philippine Islands to buyers outside the United States under the type of copra sales contract set forth above, with respect to which the landed weights were not determined until after December 31, 1949. The contracts were executed by petitioner and the respective buyers in 1949. The total amount of the invoice prices set forth in these contracts was \$3,520,633.45. All or some of the buyers paid, in 1949, 95 per cent of the invoice prices under sight drafts which accom-

panied the bills of lading, invoices, and other papers, which initial contract payments amounted to \$3,361,377.29. The record does not show precisely whether all of the foregoing 95 per cent payments were received by petitioner before the end of 1949. The balance of the total sum of the invoice amounts, i.e., 5 per cent, amounted to \$159,256.16. For some reason not explained in the record, two of the copra sales contracts included in the above total sums were not settled during 1950, the total invoice amounts of which were \$124,191.59. The rest of the 1949 contracts for the late 1949 shipments totaling \$3,396,441.86 were settled in 1950. The adjusted total amount of these contracts, which was computed after the landed weights of the shipments had been determined in 1950, was \$3,248,694.93.

With respect to the above late 1949 copra sales contracts totaling \$3,396,441.86, invoice value, the initial 95 per cent payments amounted to \$3,238,334.87, all or part of which was received by petitioner in 1949. When the landed weight of each shipment involved under these contracts was determined in 1950, two of the shipments had a landed weight of more than the invoice price, and others had a landed weight of more than the 95 per cent of shipped weight, but less than the full shipped weight. The consignees of such shipments made additional payments to petitioner in 1950, over and above their respective initial 95 per cent payments, and these additional payments amounted to \$54,186.35. On the other hand, the remainder of the shipments, each had a landed weight of less than

95 per cent of the shipped weight, so that petitioner made refunds to individual consignees of part of the initial 95 per cent payments, and these refunds amounted to \$43,826.29. The net amount of the additional payments received by petitioner in 1950, under the late 1949 sales contracts, was, therefore, \$10,360.06.

The following schedule shows, with respect to the year-end copra sales contracts executed in 1949 on which buyers made additional payments totaling \$54,186.35 above the 95 per cent of invoice prices, both the excess of the invoice prices over and above the adjusted prices based on landed weights, and the excess of the adjusted price based on landed weights above the invoice price based on shipped weights. In one instance the invoice price and the landed weight price was the same. The schedule sets forth year-end shipments to 12 buyers out of year-end shipments to a total of 17 buyers. That is to say, there were shipments, not shown below, to only 5 buyers in which the price based on landed weights amounted to less than 95 per cent of the invoice prices based on shipped weights with respect to which petitioner made refunds totaling \$43,826.29:

Invoice price	Priced Based on Landed Wt.	Excess of Invoice Price	Excess of Landed Wt.
\$ 10,749.36	\$ 10,652.77	\$ 96.59	—0—
32,250.00	31,596.83	653.17	—0—
88,650.00	88,059.20	590.80	—0—
95,750.00	93,221.63	2,528.37	—0—
92,400.00	92,400.00	—0—	—0—
92,800.00	89,468.11	3,331.89	—0—

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Invoice price	Priced Based on Landed Wt.	Excess of Invoice Price	Excess of Landed Wt.
59,700.00	57,266.23	2,433.77	—0—
537,500.00	516,598.22	20,901.78	—0—
421,395.00	408,915.00	12,480.00	—0—
285,067.50	285,101.14	—0—	\$33.64
190,000.00	190,013.49	—0—	13.49
180,000.00	172,800.00	7,200.00	—0—
<hr/> \$2,086,261.86	<hr/> \$2,036,092.62	<hr/> \$50,261.37	<hr/> \$47.13

Prior to the calendar year 1949, petitioner, under its accrual method of accounting, debited accounts receivable and credited sales income with the entire amount (100 per cent) of the invoice price of each copra sales contract executed during a calendar year, the invoice price being based on the total shipped weight shown in each bill of lading. Later, when the landed weight of the copra shipped under each sales contract was determined, the petitioner deducted, as an expense, from sales income, the dollar amount per contract of the loss in weight which had occurred during transit, i.e., the dollar amount of the difference between landed weight and shipped weight, if any.

With respect to copra sales contracts executed in 1948, and debited and credited as above-described, the deductions made on petitioner's books in 1949 for the dollar amount of loss in weight during transit, computed with respect to invoice prices, amounted to \$18,679.91.

In its income tax return for 1948, petitioner reported income from sales of copra in accordance with the above-described method of accounting for copra sales.

At the beginning of 1949, petitioner believed that the method of accounting for its copra sales, described above, resulted in an overstatement, at the time of making shipments, of the sales income ultimately realized from shipments in which there was a loss of weight during shipment. Therefore, beginning with the calendar year 1949, the taxable year, petitioner adopted another method of accounting for sales of copra made under copra sales contracts executed during 1949. Under this new practice, petitioner debited accounts receivable, only, with the entire amount (100 per cent) of the invoice price of each copra sales contract executed in 1949; petitioner credited sales income with 95 per cent of the invoice price, the amount payable by the buyer at about the time of shipment under a contract; petitioner credited the remaining 5 per cent of the invoice price to an account entitled "Reserve For Outturn Settlements."

It has been stipulated that: "Upon receipt of actual landed weights upon delivery and weighing of each cargo at destination, petitioner made an adjusting entry upon its books, eliminating the reserve applicable to the particular shipment, crediting sales income for any additional amount collected, and charging sales income for any amount refundable to buyer as a result of the landed weight being less than the 95 per cent of invoice value collected at time of shipment. As of December 31, 1949 said reserve for shipments of copra in transit and shipments upon which delivered weights had not then been determined, amounted to \$159,256.16, repre-

senting said balance of 5% of invoice value of such shipments not collected or adjusted by December 31, 1949. Landed weights were received on all [sic] of said shipments during 1950 and only \$10,360.06 of said \$159,256.16 became collectible, reflecting a loss in weight in transit of 4.31% [net] on the total of all said shipments. Appropriate adjusting entries were then made in 1950 resulting in an additional credit to sales income of \$10,360.06 [net] and the elimination of said reserve of \$159,256.16.”

In its income tax return for the taxable year 1949, petitioner reported income from sales of copra in accordance with the new method of accounting for copra sales which it adopted at the beginning of 1949.

Petitioner did not request or secure the consent of the Commissioner to change its method of accounting for income from sales of copra before computing its income for 1949 upon such new method.

In determining the deficiency for the taxable year 1949, the Commissioner included in petitioner’s taxable income \$159,256.16, and he gave the following explanation in the statement attached to the statutory deficiency notice:

(a) On your return a deduction was taken in the amount of \$159,256.16 offsetting gain reported on sales of copra in the taxable year which were in transit at December 31, 1949. Information fur-

nished by you is to the effect that the amount of \$159,256.16 was credited to a reserve to provide for the settlement of contracts covering copra shipments in transit at December 31, 1949. Under these contracts total amounts due on sales shipments were subject to adjustment for possible cargo shrinkage sustained in shipment. In the following year 1950, the shipments were adjusted on arrival, and you made settlement allowances covering the shipments in question which amounted in the aggregate to a sum less than \$159,256.16 deducted in the taxable year.

In years prior to 1949 you followed the accounting method of entering on your books the full invoice prices for shipments made as gross income realized. If shrinkage allowances were made to customers in the same or a subsequent year, such allowances were charged as expense when made. In your Federal income tax returns you reported gross income and sales allowance expense in the same manner as the entries in your books.

It is accordingly held that income was properly reflected by the method of accounting followed by you in years prior to 1949 with regard to shipments of copra in transit; that charges in 1949 to provide for a reserve against shipments in transit at December 31, 1949 represented a change in method of accounting for which you did not secure permission from the Commissioner of Internal Revenue.

It is further held that the liabilities to make al-

lowances to customers for shrinkage of shipments at December 31, 1949 represented contingent liabilities not definitely accrued in the taxable year and therefore not deductible until the liabilities therefor were definitely ascertained. The deduction of \$159,256.16 is therefore disallowed.

Issue 2: Western Vegetable Oils Company, Incorporated, hereinafter called Western, is a California corporation having its principal place of business in San Francisco. The corporation was organized in 1935. It carried on a business of producing vegetable oils from copra and other vegetable oil producing materials, and of selling the oil and the by-products in the United States. As of March 31, 1954, it discontinued its copra crushing operations because of unfavorable economic conditions in the copra crushing industry.

The outstanding stock of Western consisted of common stock only.

Prior to 1949, Western purchased 698 shares of its stock from The Bank of California, as trustee under the will of R. Carl Eddy, Jr., deceased, and 280 shares of its stock from J. H. Thies. It held these shares of stock, 978 shares, as treasury stock at the beginning and during part of 1949.

At the beginning of 1949, there were outstanding 5,182 shares of Western's stock, and such outstanding stock was held, in various amounts, by 10 stockholders, including the petitioner who held 2,094 shares, or 40.4091 per cent of the outstanding shares.

Western's outstanding stock at the beginning of 1949 was held as follows:

Stockholders	No. of Shares	Percentages
Pacific Vegetable Oil Corporation	2,094	40.4091
A. A. Schumann	1,252	24.1605
S. L. Jones & Co. (transferred to W. A. Dow, a shareholder and officer of S. L. Jones & Co. on June 28, 1949)	900	17.3680
R. J. Boomer	250	4.8244
D. S. Burness	178	3.4350
Muriel Burness	178	3.4350
Estate of P. C. Denroche, Deceased	140	2.7016
Thos. A. Allan	140	2.7016
Paul A. Schumann	25	.4824
F. Nelson	25	.4824
Total	5,182	100.0000

At various times during 1949, beginning in April, Western received offers from some of its stockholders to sell their common stock to Western, and Western accepted the offers at duly called meetings of its board of directors.

In April of 1949, the executor of the estate of P. C. Denroche, deceased, advised Western of its desire to sell 140 shares to Western, and asked for bids. Western's directors were authorized to offer the executor \$120 per share. The executor accepted the offer, and Western purchased the 140 shares on April 30, 1949, for \$120 per share. The stock was held as treasury stock, by Western, until after October 18, 1949.

During October 1949, Western received offers from other stockholders to sell their Western stock to Western for \$220 per share, as follows:

Pacific Vegetable Oil Corp.		1,346	shares
Thomas A. Allan	(all)	140	"
D. S. Burness	"	178	"
Muriel Burness	"	178	"
Paul A. Schumann	"	25	"
F. Nelson	"	25	"
Total		<u>1,892</u>	shares

These offers to sell were accepted and the purchases for \$220 per share were authorized at meetings of Western's board of directors on October 18, 1949, and October 26, 1949, and the stock was purchased by Western on dates in October and November 1949 following the directors' meetings.

As of December 31, 1948, the book value of Western's common stock was \$220 per share.

At the meeting of Western's directors on October 18, 1949, a resolution was adopted to purchase the stock of Pacific Vegetable Oil Corporation, petitioner, and of Allan, in which it was stated that the earned surplus of Western was sufficient to enable the purchases and that it was deemed to be to the best interests of Western to purchase the stock. Statements to the same effect appear in the resolutions which were adopted at the directors' meeting on October 26, 1949, when authorization was given to purchase the stock of D. S. Burness, Muriel Burness, Paul A. Schumann, and Nelson.

At the directors' meeting on October 18, 1949, a resolution was adopted authorizing the retirement and cancellation of the 698 shares which had been purchased from the trustee under the will of R.

Carl Eddy, Jr., the 280 shares which had been purchased from J. H. Thies, and the 140 shares which had been purchased from the estate of Percy C. Denroche, all of which had been held after the purchases as treasury stock. At the same meeting a resolution was adopted authorizing the retirement and cancellation of the stock to be purchased from Pacific Vegetable Oil Corporation and Thomas A. Allan. At the directors' meeting on October 26, 1949, a resolution was adopted authorizing the retirement and cancellation of the stock to be purchased from F. Nelson, Paul A. Schumann, D. S. Burness, and Muriel Burness.

Accordingly, before the end of 1949, Western retired and cancelled 978 shares of stock it had purchased before 1949 and held as treasury stock, and it purchased, retired, and cancelled, 2,032 shares of the 5,182 shares which were outstanding at the beginning of 1949. Therefore, at the end of 1949, there were 3,150 shares of its stock outstanding out of the 5,182 shares which had been outstanding at the beginning of the year.

The stock which was outstanding at the end of 1949 was held by 4 stockholders, Pacific Vegetable Oil Corporation, W. A. Dow, R. J. Boomer, and A. A. Schumann in the amounts set forth below. During 1949, 6 stockholders sold all of their stock holdings to Western, and petitioner sold 1,346 shares out of its 2,094. The stockholders at the end of 1949, and the percentage of the outstanding stock of Western held by each were as follows:

Stockholder	No. of Shares	Percentage
A. A. Schumann	1,252	39.75
W. A. Dow	900	28.57
Pacific Vegetable Oil	748	23.74
R. J. Boomer	250	7.94
	<hr/> 3,150	<hr/> 100.00

Western paid to the stockholders from whom it purchased stock during 1949, the total amount of \$433,040 for their stock, as follows:

Estate of P. C. Denroche	\$ 16,800
Thos. A. Allan	30,800
Pacific Vegetable Oil	296,120
D. S. Burness	39,160
M. Burness	39,160
F. Nelson	5,500
P. A. Schumann	5,500
	<hr/> \$433,040

Western paid \$220 per share to each of the above-named stockholders, except to the estate of P. C. Denroche to whom Western paid \$120 per share.

At a meeting of Western's directors on January 4, 1950, the directors considered offers by W. A. Dow (900 shares) and R. J. Boomer (250 shares) to sell all of their stock to Western, 1,150 shares, at \$220 per share. A resolution was adopted authorizing acceptance of these offers by Western, and the retirement and cancellation of the 1,150 shares upon purchase thereof. After Western purchased and retired the above stock, 2000 shares remained

outstanding of which A. A. Schumann held 1,252 shares, and petitioner held 748 shares.

On or about February 17, 1950, petitioner purchased from A. A. Schumann 252 shares of Western's stock at a price of \$220 per share. Thereafter, petitioner and A. A. Schumann, each, owned 1,000 shares (50%, each). Petitioner's purpose in purchasing 252 shares from A. A. Schumann was to equalize the number of shares held by each.

On or about October 24, 1949, after petitioner sold 1,346 shares of Western stock to Western, petitioner's remaining stock, 748 shares, then represented 20.1 per cent of Western's outstanding stock. On or about January 10, 1950, after Western bought the stock of Dow and Boomer, petitioner's 748 shares represented 37.40 per cent of the then outstanding stock, and the 1,252 shares held by A. A. Schumann represented 62.60 per cent of the outstanding stock.

On August 16, 1949, Western declared a cash dividend of \$10 per share to shareholders of record on August 17, 1949. This dividend was paid. On August 17, 1949, there were 5,042 shares outstanding so that the dividend which was paid amounted to \$50,420.

At the end of 1948, Western's paid-in surplus was \$69,090, and its earned surplus was \$768,299.64. Western's accumulated earnings and profits exceeded, at all times, the payments it made in 1949 for stock which it acquired from various stockholders.

Western's net income before taxes, income taxes, and paid dividends for the years 1943 through 1947 were as follows:

Year	Net Income Before Taxes	Income Taxes	Paid Dividends
1943	\$ 51,119.43	\$ 450.00	\$ 39,060
1944	65,152.50	38,596.21	11,760
1945	75,656.05	44,020.86	10,364
1946	344,858.23	137,115.08	51,820
1947	1,069,837.49	407,179.51	103,640

Western's net income before taxes, or loss, for the years 1948 through 1953, was as follows:

Year	Net Income Before Taxes
1948	\$ 88,573.88
1949	358,814.71
1950	(121,440.87)
1951	106,037.90
1952	(32,403.36)
1953	(52,140.97)

Western declared and paid dividends in 1948 and 1949 in the amounts of \$51,820, and \$50,420, respectively. No dividends were paid in 1950.

Western's cash and earned surplus at December 31 of each of the years 1948 through 1953 amounted to the following:

Year	Cash	Earned Surplus—12/31
1948	\$448,201.72	\$768,299.64
1949	238,503.21	503,756.80
1950	54,739.69	129,315.93
1951	84,466.05	233,223.71
1952	54,005.10	198,723.82
1953	48,277.30	142,854.72

The increases or decreases in Western's earned

surplus for the years 1946 through 1950 were as follows:

Year	Earned Surplus, Increase or (Decrease)
1946	\$ 155,923.15
1947	558,104.56
1948	3,095.81
1949	(264,542.84)
1950	(374,440.87)

For the years 1948 through 1950, as of December 31 of each year, Western's gross sales, gross profit or loss, expenses, and net taxable income or loss were as follows:

Year	Gross Sales	Gross Profit or (Loss)	Business Expenses	Net Tax- able Income or (Loss)
1948	\$5,617,486.61	\$214,656.89	\$164,308.51	\$ 88,573.88
1949	4,672,896.09	467,787.70	116,865.38	358,814.71
1950	6,373,894.78	(11,829.73)	115,888.12	(121,440.87)
1951	6,551,529.94	200,610.82	94,973.52	106,037.90
1952	5,661,159.15	165,790.02	221,689.16	(32,403.36)
1953	6,164,545.29	121,955.34	225,784.28	(52,140.97)

Western carried on its oil manufacturing and copra crushing business from the beginning of its business in 1935 until approximately March 31, 1954. All plant and equipment owned and maintained by Western prior to 1949 continued to be owned and maintained by Western after 1949 to and including March 31, 1954.

The basis of 1,346 shares of Western stock, which Western acquired from petitioner in 1949, was \$18,832, or about \$13.99 per share.

In its income tax return for the year 1949, petitioner reported the sum of \$296,120, which it received from Western upon its surrender of 1,346

shares of Western, as a dividend, and took a dividend credit, under section 26(b) of the 1939 Code, of 85 per cent of the sum received, or \$251,702, which left \$44,418 as taxable income received in 1949 from the transaction.

The respondent determined that there was a partial liquidation of Western in 1949; that the petitioner erred in treating the transaction as a dividend; and that the \$296,120 which petitioner received in exchange for 1,346 shares of stock of Western represented a recovery of the petitioner's cost or basis of the stock to the extent of \$18,832, and that, accordingly, the petitioner realized capital gain in the amount of \$277,288. Respondent's explanation in the statement attached to the deficiency notice is as follows:

(b) The amount of \$296,120.00 received by you from the Western Vegetable Oils Company, Inc., in return for the surrender of 1346 shares of stock of that corporation was reported on your return as dividends, against which an income credit of 85% or \$251,702.00 was claimed. Western Vegetable Oils Company, Inc., acquired these shares from you in accordance with a resolution of the directors authorizing the purchase at a price of \$220.00 per share and subsequent cancellation thereof. This transaction was one of a series of such transactions whereby the corporation purchased 3042 shares out of a total of 5042 shares outstanding. All of the holdings of seven stockholders in the aggregate of 1696 shares were purchased and cancelled by the

corporation. You retained 748 shares of the 2000 shares which remained outstanding.

You contend that your shares were redeemed and cancelled by the corporation at such time and in such manner as to make the proceeds received by you essentially equivalent to receipt of a taxable dividend under Section 115(g), I.R.C.

It is held that your gain from this transaction is taxable as long-term capital gain realized from the sale or other disposition of property in the amount calculated as follows:

Proceeds from 1346 shares	\$296,120.00
Cost Basis of stock sold	18,832.00
	<hr/>
Long-term capital gain	\$277,288.00

Accordingly dividend income of \$296,120.00 and the offsetting credit of \$251,702.00 are eliminated from your net income and the long-term capital gain of \$277,288.00 is substituted therefor.

All of the stipulated facts which have not been found herein are found as stipulated. All of the exhibits attached to the stipulation are incorporated herein by this reference.

With respect to copra sales in transit at the end of 1949, liabilities had not become fixed, before or at the end of 1949, and, therefore, had not been incurred, placing upon petitioner liabilities to reduce the charges for the copra in transit to any amounts less than the contract-invoice prices. The contract-invoice prices agreed to in 1949 were not inflated. The new system of accounting for copra sales in transit at the end of the year which peti-

tioner adopted in 1949 constituted a change in its accrual method of accounting for which the Commissioner's prior consent was required.

The distribution of Western Vegetable Oils Company to petitioner in 1949, in exchange for 1,346 shares of Western's stock owned by petitioner, was a distribution in partial liquidation. The distribution to petitioner was in cancellation and redemption of part of Western's stock. The distribution and cancellation and redemption of the stock was not at such time and in such manner as to be in whole or in part essentially equivalent to the distribution of a taxable dividend.

Opinion

Harron, Judge: Issue 1: The petitioner keeps its books and reports its income on an accrual method of accounting. Prior to 1949, with respect to income from sales of copra under a standard copra sales contract, petitioner accrued the entire invoice amount of such contracts in the year of the contract and it did so with respect to its year-end contracts where copra was in transit and the landed weights thereof had not been determined prior to the end of the taxable year. The problem under this issue relates to contracts executed in the latter part of 1949 which we refer to as year-end contracts for convenience. The petitioner adopted a new system in 1949 of including in gross income only 95 per cent of the invoice amount of its year-end contracts. The petitioner takes the position that 95 per cent of invoice prices was paid before the end of 1949

on the sight drafts accompanying the bills of lading which were mailed to the banks of buyers and paid by the buyers before December 31, 1949. This appears to be the purport of an exhibit attached to the stipulation of facts. The petitioner contends that the new system adopted in 1949 is consistent with its accrual method of accounting, that it more clearly reflects annual income, that it corrects a previous error in its accrual method, and that the new system does not constitute a change in its accrual accounting method for which permission of the Commissioner was required under Regulations 111, section 29.41-2¹. The petitioner contends that only 95 per cent of invoice price under its copra sales contracts accrued in the taxable year, with respect to its year-end contracts under which landed weights had not been determined prior to December 31, and that the remaining 5 per cent of invoice prices did not accrue in 1949. On the point of what constitutes accrued income, petitioner cites L. O. 1086, 1 C.B.-1, p. 87; North American Oil Consoli-

¹ Regulations 111:

Sec. 29.41-2. Bases of Computation and Changes in Accounting Methods.— * * * * *

A taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. For the purposes of this section, a change in the method of accounting employed in keeping books means any change in the accounting treatment of items of income or deductions, such as a change from cash receipts and disbursements method to the accrual method, or vice versa;
* * * * *

dated v. Burnet, 286 U.S. 417; Permanent Homes Land Co., 27 B.T.A. 147; Helvering v. Russian Finance and Construction Co., 77 F. 2d 324. Petitioner relies on Corn Exchange Bank v. United States, 37 F. 2d 34; and Great Northern Railway Co., 8 B.T.A. 225.

The respondent has determined that the entire invoice amounts of the copra sales contracts which are involved under this issue are includible in gross income for 1949. His determination resulted in adding to income \$159,256.16. The respondent determined that the accounting system used by petitioner prior to 1949, as it applied to copra shipments in transit under year-end contracts, properly reflected petitioner's income. He contends that the new system adopted by petitioner in 1949 represents a change in accounting method and that since petitioner did not request or obtain permission for a change in accounting method it was error for petitioner to omit 5 per cent of invoice prices, \$159,256.16, from 1949 income. Respondent also determined that petitioner's liabilities to make allowances to buyers for loss in weight of copra while in transit were, as of December 31, contingent liabilities not definitely incurred or accrued in the taxable year, and, therefore, not deductible until such liabilities were definitely ascertained. Respondent contends, also, that the full amount of the invoice prices of copra in transit accrued before December 31, 1949. Respondent cites the following cases: Ross B. Hammond, Inc., 36 B.T.A. 497, affd. 97 F. 2d 54; Estate of L. W. Mallory, 44

B.T.A. 249; *Berryman D. Fincannon*, 2 T.C. 216, 220; *Kahuku Plantation Co. v. Commissioner*, 132 F. 2d 671, affirming 43 B.T.A. 784; *Brown v. Helvering*, 291 U.S. 193; *Crescent Cotton Co.* 5 B.T.A. 350; and *David J. Joseph Co. v. Commissioner*, 136 F. 2d 410.

Petitioner admittedly did not request or obtain permission to make a change in its method of accounting for income from copra sales contracts covering copra in transit. Regulations 111, section 29.41-2, and prior regulations to the same effect, have the purpose of promoting consistent accounting practice from year to year, thereby securing uniformity in the collection of the revenues. The regulation is reasonable and valid and compliance with it has been held to be mandatory. *Ross B. Hammond, Inc. v. Commissioner*, *supra*; *Estate of L. W. Mallory*, *supra*; *St. Paul Union Depot Co. v. Commissioner*, 123 F. 2d 235; *Berryman D. Fincannon*, *supra*; *Elmwood Corporation v. United States*, 107 F. 2d 111. The Commissioner determined that petitioner, in the taxable year 1949, changed its method of accounting with respect to sales of copra in transit and the income therefrom. That determination is presumptively correct and the petitioner has the burden of proving it is erroneous. *St. Paul Union Depot Co. v. Commissioner*, *supra*, p. 240; *Welch v. Helvering*, 290 U.S. 111.

One question under this issue is whether the petitioner in 1949 changed its method of accounting and basis for reporting income from sales where the shipment was in transit. As has been stated

above, petitioner argues that its new system did not represent a change in accounting method. The petitioner has the burden of proving that it did not change its accounting method. The evidence under this issue consists chiefly of stipulated facts and two exhibits (1A, the sales contract form, and 2B, a schedule about invoice amounts, adjusted charges, and additional payments by buyers or refunds by petitioner). There is very little testimony. It is well to mention, preliminarily, a few matters about petitioner's evidence. Petitioner uses the term "shipped weights" rather loosely. That term means, as we understand, the quantity specified in a sales contract, such as 550 tons, or some other specified quantity; it does not mean extra tons which may be shipped by petitioner in an overweighting procedure for market advantage. When a shipment is overweighted at the place of shipment, the invoice amount is computed upon the weight specified in a contract, nevertheless. Another point which is not entirely clear is whether under the new system adopted in 1949, petitioner regarded as "accrued" before the end of the year, only the 95 per cent of invoice price payments represented by payment or acceptance before the end of the year of sight drafts for such amounts, or whether petitioner regarded such 95 per cent as "accrued" before the end of the year on the basis of an executed contract and shipment of copra regardless of whether a sight draft had been paid or accepted before the end of the year. Since petitioner has not made any point of these details, they do not affect our conclu-

sions but we have observed that accuracy about them is to be desired, and petitioner's lack of accuracy, if material, serves only to indicate some inadequacies in petitioner's proof.

Prior to 1949, petitioner accrued in income of a taxable year the entire amount of invoice prices computed under sales contracts which had been executed in a taxable year and under which contracts shipment had been made. The contract specified a certain number of tons and the price per ton. The invoice price was the result of multiplying the specified number of tons by the specified price per ton. Also, prior to 1949, petitioner treated as an "expense" of a sale, in the year landed weight was determined for a shipment, the amount of the adjustment in the charge to the buyer. Such amount was the dollar value of the difference between the tons specified in the sales contract (shipped weight) and the tons determined upon a reweighing of the shipment at the end of transit (landed weight). Such "expense" was deducted in a year following the year for which invoice price was accrued, if the landed weight was determined after the end of the year of shipment under the sales contract. Also, prior to 1949, under the accounting method followed by petitioner, no "Reserve for Outturn Settlements" was carried on petitioner's books. We conclude that the new system adopted in 1949 constituted a change in petitioner's method of accounting. We are not satisfied that petitioner has shown that the new system did not represent a change in accounting method. We understand that under

the new system, petitioner accrues as income in a taxable year, only the amounts which are paid by a buyer, rather than the amounts computed under the sales contract, i.e., the invoice price. That is to say, petitioner includes in income, first, 95 per cent of the invoice price, and in a later year, it includes any additional payments of the buyer made after landed weights are determined. Also, under this system petitioner will not treat as an expense, and deduct, the difference between invoice price and the adjusted price based on outturn weights. In our opinion, the accruing of 95 per cent, rather than 100 per cent, of invoice price, the setting up of a so-called reserve of 5 per cent for future adjustments, to be made after the close of a taxable year, and the abandonment of the method of taking as expense deductions the amount of adjustments in invoice price made after the taxable year, constitute a change in accounting method. Cf. *Brown v. Helvering*, *supra*.

The effect of the Commissioner's determination is to require that petitioner continue to use the accounting method consistently employed by petitioner in prior years. The Commissioner has determined that the method consistently followed before 1949 clearly and accurately reflected income. Sections 41 and 42, Internal Revenue Code of 1939. The Commissioner's determination is within the broad administrative discretion accorded to him under the statute. See *Brown v. Helvering*, *supra*, where it was said, that "It is not the province of the court to weigh and determine the relative merits

of systems of accounting." The Commissioner's determination that petitioner shall continue to use the accounting method consistently followed unless his permission to change is given, is not to be disturbed unless an abuse of his wide administrative discretion is evident. *Schram v. United States*, 118 F. 2d 541; *Shoong Inv. Co. v. Anglim*, 45 F. Supp. 711. We are unable to find that there has been an abuse of discretion as the following observations may serve to demonstrate.

The petitioner does not deny that upon the execution in 1949 of the copra sales contracts involved under this issue, contracts were formed in which a quantity of goods was specified, the price per ton was specified, the initial 95 per cent payment was based upon such quantity and price, otherwise known as the invoice price, and that the petitioner's right to receive payment of such price was fixed during 1949. Also, the petitioner takes the position that the 95 per cent of invoice price payments were received before the end of 1949. The petitioner does not deny that, accordingly, title to the shipments passed to the buyers upon their payment of sight drafts in the amount of 95 per cent and their receipt of bills of lading to which the sight drafts were attached, or that petitioner made technical delivery of the shipments to the buyers before the end of 1949 upon the payment of and acceptance by the buyers of the sight drafts. See *Williston, Sales* (rev. ed.) par. 289, and par. 305. We think it is clear, that under the contracts in question, namely the year-end contracts where copra

was in transit, the year 1949 was the year in which petitioner's right to receive payment for such sales became fixed, and that the amount of the payment was determined, as well. For example, if the shipment were lost at sea, the invoice price thereof was the amount petitioner had a right to recover, other things being equal. It is the right to receive income, not the actual receipt thereof that determines when it should be accrued and included in gross income. *United States v. Harmon*, 205 F. 2d 919; *Security Flour Mills Co. v. Commissioner*, 321 U.S. 281; *Continental Tie & Lumber Co. v. United States*, 286 U.S. 290; *Spring City Foundry Co. v. Commissioner*, 292 U.S. 182. Although adjustment might be made in the amount of the invoice price after determination of landed weight, this was, we believe, only part of and due to the seller's warranty, specific or implied, that it would deliver the quantity called for by the sales contract, and that if the quantity unloaded at the end of transit should be less, according to outturn weight, the buyer would not be charged for more goods than he received. As was stated in *David J. Joseph Co. v. Commissioner*, *supra*, p. 411,

In practically every contract of sale for merchandise there is an implied warranty of quality and quantity of the merchandise sold, for the breach of which the merchant would be liable to the buyer, but the breach would not develop prior to delivery, and the right to demand damages or a refund would not accrue until its discovery. * * *

The amounts of future adjustments in the invoice

prices were contingent and liability for them did not accrue in the taxable year 1949. Crescent Cotton Co., *supra*. That they were contingent, not fixed, and not susceptible of an accurate estimate in 1949 is amply shown by the evidence before us. In one instance, upon adjustment in 1950 of the invoice price after determination of landed weight, the adjusted price was only \$96.59 less than the invoice price; in another instance, it was \$20,901.78 less than the invoice price; in two instances, the invoice price was less than the adjusted, landed weight price; in one instance there was no adjustment in invoice price when landed weight was determined. However that may be, the contingency of having to make adjustments in invoice prices does not prevent the accrual of income in the year in which the right to income under the sales contracts became fixed. *Brown v. Helvering*, *supra*.

The petitioner has failed to show that the Commissioner has abused his administrative discretion in making the determination which has given rise to this issue. Furthermore, the petitioner has not produced evidence to show that in the copra selling business it is customary to accrue in the year sales contracts are made under which the shipment is in transit, only 95 per cent of the invoice price rather than 100 per cent. Cf. *Pacific Grape Products Co. v. Commissioner*, 219 F. 2d 862, reversing 17 T.C. 1097.

We think, also, that petitioner's action in effecting a new system of accounting for income from copra sales contracts where shipments were in tran-

sit, whereby it changed the manner of treating items of income and expense cannot be denominated as merely a technical correction of prior errors, or a mere change in "accounting practices," as petitioner chooses to call it. This was a substantial change which may have had some adverse effect upon the revenues, and, therefore, it clearly required the Commissioner's prior consent to the change. *Curtis R. Andrews*, 23 T.C. 1026.

The authorities cited by the petitioner have been considered. They are either inapplicable or distinguishable on their facts.

There are other points which, if discussed, would demonstrate further the errors in petitioner's general contentions. One, for example, is that the Internal Revenue Code makes specific provision for certain reserves, such as reserves for bad debts, and provides how such specific reserves may be treated for tax purposes. With these exceptions, the rule is that reserves may be deducted only in the year when they represent liabilities which have been incurred. *Brown v. Helvering*, *supra*. The reason underlying the rule is that a liability does not accrue while it remains contingent. It is clear that any liability of petitioner to reduce the contract-invoice price was, at the end of 1949, contingent. The record shows that petitioner sometimes overweighted shipments (without any change in the contract-invoice price) so as to make up for shrinkage and loss of weight in transit. When that was done, landed weights would equal or be close to the contract-invoice weight and price and, then, no

or little adjustment downward of the contract-invoice price would be required. The evidence does not establish that the contract-invoice price was an inflated amount. Of course, if petitioner underweighted a shipment, shipping fewer tons than the contract specified, an adjustment downward of the contract-invoice price would be necessary when the consignee took possession of and reweighed the shipment. The record indicates that petitioner sometimes underweighted shipments when it believed that practice was advantageous because of the trend of the market prices of copra. But this practice was within petitioner's control. Also, it provides a possible explanation of why at times landed weights of shipments were more than normally less than the weights shipped per contract.

In view of the conclusions we have reached, it is not necessary to discuss other aspects of the issue even though consideration has been given to them.

The Commissioner's determination is sustained. *Berryman D. Fincannon, supra*; *Advertisers Exchange, Inc.*, 25 T.C. (February 24, 1956).

Issue 2: In 1949, Western Vegetable Oils Company, Inc., had only one class of issued and outstanding stock, namely, common stock, and petitioner, 1 of 10 stockholders, owned 2,094 shares out of 5,182 shares, or 40.4 per cent of the stock. In October 1949, Western acquired, cancelled, and required 1,346 shares of the stock held by petitioner for which it paid \$220 per share, or \$296,120. It is agreed that, if material, petitioner's basis for the

stock so acquired was \$18,832, or about \$13.99 per share. Since petitioner received \$296,120, the long-term capital gain would be \$277,288, if respondent's determination is correct.

Petitioner treated Western's distribution of \$296,120 as dividends and took a dividend credit of 85 per cent under section 26(b) of the 1939 Code, in the amount of \$251,702, whereby \$44,418 of the alleged dividend remained subject to tax.

The Commissioner's determination results in the elimination of \$296,120 from dividend income of the petitioner and, correspondingly, elimination of a credit against dividend income of \$251,702; and the inclusion of \$277,288 in petitioner's net long-term capital gain. Petitioner did not have any net short-term capital loss in 1949 to offset against net long-term capital gain.

The petitioner contends that the distribution by Western in exchange for its stock was at such time and in such manner as to make the distribution and cancellation of the stock "essentially equivalent to the distribution of a taxable dividend" within the provisions of section 115(g)(1) of the 1939 Code. The Commissioner maintains that the entire amount of the distribution must be treated as in payment for the stock under section 115(c), and that none of the distribution was essentially equivalent to a taxable dividend. Respondent relies upon Regulations 111, section 25.115-9, the material part of which is as follows:

The question whether a distribution in connection with a cancellation or redemption of stock is essen-

tially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. * * *

It is concluded that petitioner has failed to prove that the distribution to petitioner by Western in 1949 of \$296,120 in exchange for 1,346 shares of Western's stock was at such time and in such manner as to make the distribution, and the cancellation and redemption of the stock, essentially equivalent to the distribution of a taxable dividend within the intendment of section 115(g).

The facts show that after petitioner surrendered 1,346 shares of Western's stock, petitioner's relationship to Western was essentially changed. For example, after Western acquired, in April or May 1949, 140 shares of its stock from the estate of Denroche, petitioner's block of Western's stock 2,094 shares, represented 41.5 per cent of the outstanding stock, 5,042 shares. After petitioner surrendered 1,346 shares, it retained 748, and, also, there remained 3,696 shares of Western's stock outstanding. Accordingly, petitioner's remaining 748 shares rep-

resented 20.1 per cent of Western's outstanding stock.

The distribution to petitioner was a distribution by Western "in complete cancellation or redemption of a part of its stock." Western cancelled and retired the stock. Furthermore, the distribution to petitioner was one of a series by Western in complete cancellation and redemption of part of its stock. In 1949, Western received and accepted offers from six stockholders, in addition to petitioner, to surrender all of their stock which amounted to 686 shares. All of these transactions were bona fide, arm's-length transactions in which the surrendered stock was retired. Including the 1,346 shares which petitioner surrendered, 2,032 shares were cancelled and retired by Western. In addition, Western retired 978 shares which it had acquired before 1949 and had held as treasury stock. There were, therefore, a series of distributions by Western in complete cancellation and retirement of stock, all of which stock constituted a portion of the outstanding stock. These distributions, of which the distribution to petitioner was one, come within the definition of partial liquidation set forth in section 115(i). It has been stated that in order to be "a partial liquidation it is not necessary that the corporation be planning a cessation of business or be in the process of final liquidation," or that all of the outstanding stock be retired at once. *Benjamin R. Britt*, 40 B.T.A. 790, 796, 797; *affd.* 114 F. 2d 10; *Commissioner vs. Quackenbos*, 78 F. 2d 156; *Commissioner v. Cordingley*, 78 F. 2d 118; *Salt*

Lake Hardware Co., 27 B.T.A. 482. Section 115(i) "applies, not to a distribution in liquidation of the corporation or its business, but to a distribution in cancellation or redemption of a part of its stock" Hamilton Allport, 4 T.C. 401, 403. The mere existence of sufficient earnings and profits to cover the acquisition of the stock does not automatically bring the transaction within the provisions of section 115(g). Fred B. Snite, 10 T.C. 523, 531, *affd.* 177 F. 2d 819.

We recognize that the net effect of the transaction is to be considered. *Flanagan v. Helvering*, 116 F. 2d 937 in determining whether section 115(g) applies. In applying the "net effect" rule, we have observed that no one factor is controlling, Fred B. Snite, *supra*, and that all relevant factors must be considered in determining the net effect of the transactions. We have considered all of the factors which the evidence discloses. For example, Western had declared and paid dividends in each year, including 1949, since 1943. Also, the distribution which petitioner received upon the surrender of 1,346 shares of Western's stock, was not one of a pro rata distribution to all of Western's then existing stockholders. A. A. Schumann, Western's president, did not receive any such or comparable distribution. We are unable to find that the distribution received by petitioner was in any sense a substitute for regular dividends which otherwise would have been payable.

We note that the evidence submitted by petitioner is lacking in explanation for Western's se-

resented 20.1 per cent of Western's outstanding stock.

The distribution to petitioner was a distribution by Western "in complete cancellation or redemption of a part of its stock." Western cancelled and retired the stock. Furthermore, the distribution to petitioner was one of a series by Western in complete cancellation and redemption of part of its stock. In 1949, Western received and accepted offers from six stockholders, in addition to petitioner, to surrender all of their stock which amounted to 686 shares. All of these transactions were bona fide, arm's-length transactions in which the surrendered stock was retired. Including the 1,346 shares which petitioner surrendered, 2,032 shares were cancelled and retired by Western. In addition, Western retired 978 shares which it had acquired before 1949 and had held as treasury stock. There were, therefore, a series of distributions by Western in complete cancellation and retirement of stock, all of which stock constituted a portion of the outstanding stock. These distributions, of which the distribution to petitioner was one, come within the definition of partial liquidation set forth in section 115(i). It has been stated that in order to be "a partial liquidation it is not necessary that the corporation be planning a cessation of business or be in the process of final liquidation," or that all of the outstanding stock be retired at once. *Benjamin R. Britt*, 40 B.T.A. 790, 796, 797; *affd.* 114 F. 2d 10; *Commissioner vs. Quackenbos*, 78 F. 2d 156; *Commissioner v. Cordingley*, 78 F. 2d 118; *Salt*

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We recognize that the net effect of the transaction is to be considered. *Flanagan v. Helvering*, 116 F. 2d 937 in determining whether section 115(g) applies. In applying the "net effect" rule, we have observed that no one factor is controlling, *Fred B. Snite, supra*, and that all relevant factors must be considered in determining the net effect of the transactions. We have considered all of the factors which the evidence discloses. For example, Western had declared and paid dividends in each year, including 1949, since 1943. Also, the distribution which petitioner received upon the surrender of 1,346 shares of Western's stock, was not one of a pro rata distribution to all of Western's then existing stockholders. A. A. Schumann, Western's president, did not receive any such or comparable distribution. We are unable to find that the distribution received by petitioner was in any sense a substitute for regular dividends which otherwise would have been payable.

We note that the evidence submitted by petitioner is lacking in explanation for Western's se-

ries of distribution in retirement of stock. There is no testimony relating to these transactions.

Upon the record before us, it is our opinion that the various factors which are before us for consideration lead to the conclusion that the transaction in question whereby petitioner surrendered 1,346 shares of Western's stock, did not have the equivalence of a taxable dividend under section 115(g). It is held that the distribution in question was a distribution in partial liquidation within the meaning of section 115(i), and that it is taxable under the provisions of section 115(c). The respondent's determination is sustained.

Decision will be entered for the respondent.

Served April 5, 1956.

The Tax Court of the United States
Washington

Docket No. 50344

PACIFIC VEGETABLE OIL CORPORATION,
Petitioner;

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed April 5, 1956, it is

I. Jurisdiction

Petitioner is a corporation organized and existing under the laws of the State of California, with its principal place of business in the City and County of San Francisco, State of California.

Petitioner filed its Federal income tax return for its taxable year ended December 31, 1949, with the Collector of Internal Revenue for the First District of California, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Jurisdiction of this Court to review the aforesaid decision of The Tax Court of the United States is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II. Nature of Controversy

The controversy herein involves the following issues, which were presented to The Tax Court of the United States:

1. Whether the adoption by petitioner, in the year 1949, of a system of accounting for sales of copra shipped from the Philippine Islands and in transit at the end of said year, under sales contracts calling for payment of 95 per cent of contract price at time of shipment and balance of contract price upon determination of weights received at destination, so as to include in gross income of the year of shipment 95 per cent of the contract sales price and to carry, in a reserve denominated "Reserve for Outturn Settlements," the remaining 5 per cent of said contract sales price, constituted a

change in accounting method requiring prior approval by the Commissioner.

2. Whether a distribution in cash received by petitioner in the year 1949 from Western Vegetable Oils Company, Inc., a corporation, upon surrender of a portion of the stock owned by petitioner in said Western Vegetable Oils Company, Inc., was a distribution essentially equivalent to the distribution of a taxable dividend or was a distribution in partial liquidation.

Wherefore, petitioner petitions that the findings of fact and opinion and decision of The Tax Court of the United States in the above-entitled cause be reviewed by the United States Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and submitted to the Clerk of the said Court of Appeals for filing, and that appropriate action be taken to the end that the errors of The Tax Court may be reviewed and corrected by the said Court of Appeals.

Dated: June 29, 1956.

/s/ DUDLEY F. MILLER,
Counsel for Petitioner

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed July 2, 1956.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 18, inclusive, constitute and are all of the original papers and proceedings as called for by the "Designation of Record on Review", including Joint Exhibits 1-A through 12-L, admitted in evidence, on file in my office as the original and complete record in the proceeding before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 24th day of July, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States

[Endorsed]: No. 15273. United States Court of Appeals for the Ninth Circuit. Pacific Vegetable Oil Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: August 17, 1956.

Docketed: September 13, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 15273

PACIFIC VEGETABLE OIL CORPORATION,
a corporation, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS TO BE RELIED
ON UPON REVIEW

Petitioner states that it intends to rely on the following points upon review of its decision with The Tax Court of the United States in the above-entitled cause:

1. The Tax Court decision dealt with two sepa-

rate and distinct issues, designated in The Tax Court decision as Issue 1 and Issue 2. Issue 1 related to certain accounting practices adopted by petitioner in the taxable year involved, the year 1949, which the Commissioner of Internal Revenue refused to accept. Subsequent to the filing of the petition herein, petitioner's returns for subsequent taxable years have been adjusted by the Internal Revenue Service on the basis of The Tax Court decision, the effect of these adjustments being substantially to eliminate in subsequent years the adverse effect upon petitioner of The Tax Court decision with relation to the taxable year involved, the taxable year 1949. In consequence, petitioner withdraws its request for review of The Tax Court decision on Issue 1, and therefore makes no statement of points upon which it intends to rely with relation to this issue.

2. With respect to Issue 2 of The Tax Court decision, petitioner intends to rely upon the following points:

a. The Tax Court erred in holding and deciding that a distribution in cash in the amount of \$296,120 received by petitioner from Western Vegetable Oils Company, Inc., in the year 1949 constituted a distribution in partial liquidation within the meaning of Section 115(i) and taxable under the provisions of Section 115(c), Internal Revenue Code of 1939.

b. The Tax Court erred in failing to hold and to decide that this distribution to petitioner by

Western Vegetable Oils Company, Inc., constituted a distribution essentially equivalent to the distribution of a taxable dividend within the meaning of Section 115(g) of the Internal Revenue Code of 1939, in view of the fact that

(1) said distribution was made in cash and was charged to Western's earned surplus account;

(2) Western had sufficient earnings and profits accumulated since February 28, 1913, to cover said distribution and all other like distributions;

(3) Western maintained all of its plant equipment and other operating assets, and its business continued after the distribution in substantially the same manner and at substantially the same volume as before the distribution; and

(4) Petitioner's interest in and degree of control of the distributing corporation was substantially the same after as before the distribution.

3. The Tax Court erred in holding and deciding that petitioner realized capital gain from said distribution.

4. The Tax Court erred in failing to hold and to decide that petitioner was entitled to a credit against the amount of said distribution, as a credit against net income, in the sum of \$251,702, representing 85 per cent of dividends totaling \$296,120 received by petitioner from a domestic corporation, namely, Western Vegetable Oils Company, Inc., under Section 26(b) of the Internal Revenue Code of 1939.

5. The Tax Court erred in holding and deciding that there is any deficiency in income tax paid by petitioner for the year 1949 resulting from the receipt by petitioner of this distribution.

6. The Tax Court erred in that its opinion and decision are contrary to law and the regulations, and are not supported by substantial evidence of record.

Dated: September 21, 1956.

/s/ DUDLEY F. MILLER,
Counsel for Petitioner

[Endorsed]: Filed September 26, 1956. Paul P. O'Brien, Clerk.

No. 15,273

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PACIFIC VEGETABLE OIL CORPORATION,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONER.

DUDLEY F. MILLER,

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FILED

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No. 15,273

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PACIFIC VEGETABLE OIL CORPORATION,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONER.

I.

JURISDICTION.

Petitioner is a corporation organized and existing under the laws of the State of California, with its principal place of business in the City and County of San Francisco, State of California.

Petitioner filed its Federal Income Tax Return for its taxable year ended December 31, 1949, with the Collector of Internal Revenue for the First District of California, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

On June 5, 1953, a notice of deficiency was mailed to petitioner by the Commissioner of Internal Revenue

(T.R. 11-18). On August 31, 1953, petitioner filed in the Tax Court of the United States its petition for a redetermination of the deficiency in income tax liability as set forth in said notice of deficiency (T.R. 4). Jurisdiction of the Tax Court was based on Section 272(a) of the Internal Revenue Code of 1939.

On August 5, 1956, the Tax Court of the United States entered a decision determining a deficiency in income tax for the calendar year ended December 31, 1949 (T.R. 118-119).

Jurisdiction of this Court to review the aforesaid decision of the Tax Court of the United States is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

On August 17, 1956, petitioner filed in this Court its petition for review (T.R. 119).

II.

STATEMENT OF THE CASE.

The Tax Court decision dealt with two separate and distinct issues, designated in the Tax Court opinion as Issue 1 and Issue 2. Only the second of these issues is presented for consideration in this Petition for Review, Issue 1, as shown in the "Statement of Points to Be Relied on Upon Review" (T.R. 123), having been eliminated subsequent to the filing of this petition.

The issue before this Court involves the application of Section 115(g)(1) of the Internal Revenue Code

of 1939 to certain corporate distributions made in the calendar year 1949 by Western Vegetable Oils Company, Incorporated, a corporation, to Petitioner, one of Western's shareholders and likewise a corporation.

Section 115(g)(1) reads as follows:

“If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such times and in such manner as to make the distribution and cancellation in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.”

Petitioner is a corporation organized and existing under the laws of the State of California, with its principal place of business in San Francisco, California. Western, the distributing corporation, is a corporation likewise organized and existing under the laws of the State of California, with its principal place of business in San Francisco, California. It was organized in the year 1935 for the purpose of engaging in the vegetable oil business, chiefly in the crushing of copra and other oil-bearing materials for the production of coconut oil and meal and other vegetable oils and meals therefrom. It continued to engage in this business until March 31, 1954, at which time its copra crushing operations were discontinued as a result of unfavorable economic conditions in the

copra crushing industry (Stipulation of Facts, Para. IV, T.R. 21).

At the beginning of the year 1949, Western had 5,182 shares of common stock outstanding; 2,094 or 40.4091 per cent, of these shares being held by Petitioner, 1,252 shares, or 24.1605 per cent being held by A. A. Schumann, and the remainder by eight (8) other shareholders, one of the latter, the estate of a deceased shareholder (Stipulation of Facts, Para. V, T.R. 21 and 22).

Between April 30, 1949, and January 10, 1950, Western acquired all of its shares owned by shareholders other than Petitioner and A. A. Schumann. From Petitioner, it acquired 1,346 of the 2,094 shares owned by Petitioner and from Mr. Schumann, none. All of the shares so acquired from all shareholders, with the exception of 140 shares acquired from the estate of a deceased shareholder on April 30, 1949, were acquired for the same cash distribution, namely, \$220.00 a share. All shares so acquired were surrendered to Western and cancelled (Stipulation of Facts, Para. VI, T.R. 22 and 23).

When these acquisitions were concluded, there remained outstanding 2,000 shares of Petitioner's stock, 1,252 in the hands of Mr. Schumann and 748 in the hands of Petitioner. On February 17, 1950, Petitioner purchased from Schumann 252 shares of stock held by him in Western at a price of \$220.00 per share, for the purpose of rendering the ownership of Petitioner and Schumann of all of the outstanding stock

of said corporation equal (Stipulation of Facts, Para. VI, T.R. 23). Petitioner and Schumann then each owned 1,000 shares and were the sole shareholders of Western.

At the beginning of the year 1949, Western had earned surplus available for the payment of dividends in the amount of \$768,299.64. All sums distributed to shareholders in the course of acquiring their stock were charged to earned surplus, leaving \$503,756.80 in earned surplus at the end of 1949, after the 1949 distributions (Stipulation of Facts, Exhibit 9-I, T.R. 42).

After these distributions and the acquisition of shares above mentioned, Western's operations continued until March 31, 1954, in the same manner as in prior years, processing approximately the same quantities of copra and other oil-bearing materials, maintaining the same volume of gross sales, and maintaining and operating all plant and equipment owned by it prior to the stock acquisition (Stipulation of Facts, Para. VII, T.R. 24, 25 and Exhibit 10-J, T.R. 43).

In its Income Tax Return for the year 1949, Petitioner reported the \$296,120 it had received from Western in consideration of surrender of 1,346 of its 2,094 shares of stock as a dividend, on the basis that the distribution was "essentially equivalent to the distribution of taxable dividend" within the meaning of Section 115(g)(1), Petitioner having disposed of only a portion of its stock, Western having had ample earned surplus available for the declaration of divi-

dends, having charged the distribution to earned surplus, the control of Western not having substantially changed as between Petitioner and Schumann, Western having continued in business after the distribution in substantially the same manner as before, and there being no legitimate business purpose to justify the distribution by Western.

The Commissioner of Internal Revenue insisted upon treating the distribution as a distribution in partial liquidation, and, therefore, Petitioner's receipts as capital gain. The Tax Court supported the Commissioner's contention, and the issue in this case is whether the Tax Court was correct in doing so.

III.

STATUTES AND REGULATIONS INVOLVED.

The pertinent parts of the statutes and regulations involved in this case are as follows:

Internal Revenue Code of 1939, sec. 115:

Distributions by corporations.

“(c) Distributions in Liquidation. . . amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock . . . In the case of amounts distributed . . . in partial liquidation . . . the part of such distribution which is properly chargeable to capital accounts shall not be considered a distribution of earnings or profits . . .

(g) Redemption of Stock.

1. In General. If a corporation cancels or redeems its stock . . . at such time and in such

manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

(i) **Definition of Partial Liquidation.** As used in this section the term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation of redemption of all or a portion of its stock.

Regulations 111:

Sec. 29.115-5. **Distributions in Liquidation.** Amounts distributed in complete liquidation of a corporation are to be treated as in full payment in exchange for the stock so cancelled or redeemed. . . .

The term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions or redemptions of all or a portion of its stock. A complete cancellation or redemption of a part of its stock may be accomplished, for example, by the complete retirement of all the shares of a particular preference or series, or by taking up all the old shares of a particular preference or series and issuing new shares to replace a portion thereof, or by a complete retirement of any part of the stock, whether or not pro rata among the shareholders.

Sec. 29.115-9. Distribution in Redemption or Cancellation of Stock Taxable as a Dividend.

The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation of redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend.”

IV.

SPECIFICATION OF ERRORS.

1. The Tax Court erred in holding and deciding that a distribution in cash in the amount of \$296,120 received by Petitioner from Western Vegetable Oils Company, Inc., in the year 1949 constituted a distribution in partial liquidation within the meaning of Section 115(i) and taxable under the provisions of Section 115(c), Internal Revenue Code of 1939.

2. The Tax Court erred in failing to hold and to decide that this distribution to Petitioner by Western Vegetable Oils Company, Inc., constituted a distribu-

tion essentially equivalent to the distribution of a taxable dividend within the meaning of Section 115(g) of the Internal Revenue Code of 1939, in view of the fact that

(a) said distribution was made in cash and was charged to Western's earned surplus account;

(b) Western had sufficient earnings and profits accumulated since February 28, 1913, to cover said distribution and all other like distributions;

(c) Western maintained all of its plant equipment and other operating assets, and its business continued after the distribution in substantially the same manner and at substantially the same volume as before the distribution; and

(d) Petitioner's interest in and degree of control of the distributing corporation was substantially the same after as before the distribution.

(e) There was no legitimate business purpose to justify the distribution by Western.

3. The Tax Court erred in holding and deciding that Petitioner realized capital gain from said distribution.

4. The Tax Court erred in failing to hold and to decide that Petitioner was entitled to a credit against the amount of said distribution, as a credit against net income, in the sum of \$251,702 representing 85 per cent of dividends totaling \$296,120 received by Petitioner from a domestic corporation, namely, Western Vegetable Oils Company, Inc., under Section 26(b) of the Internal Revenue Code of 1939.

5. The Tax Court erred in holding and deciding that there is any deficiency in income tax paid by Petitioner for the year 1949 resulting from the receipt by Petitioner of this distribution.

6. The Tax Court erred in that its opinion and decision are contrary to law and the regulations, and are not supported by substantial evidence of record.

V.

ARGUMENT.

A.

THE "NET EFFECT" OF A CORPORATE DISTRIBUTION UPON THE DISTRIBUTING CORPORATION IS THE FUNDAMENTAL INQUIRY IN INTERPRETING SECTION 115(g).

It is now firmly established that in applying Section 115 (g) and the regulations thereunder to a corporate distribution, the "net effect" of the distribution on the distributing corporation, rather than the motives and plans of the taxpayer or the corporation, is the fundamental inquiry to be made in deciding whether the distribution is "essentially equivalent to the distribution of a taxable dividend."

The leading case establishing this principle is *Flanagan v. Helvering* (C.C.A. D.C. 1940), 116 F. 2d 937. In this case, the Court said at page 939:

"But the net effect of the distribution, rather than the motives and plans of the taxpayer or his corporation, is the fundamental question in administering 115(g)."

This principle has been affirmed regularly in a number of cases, examples of which are:

James F. Boyle (1950), 14 T.C. 1382, aff'd. (C.A. 3rd Cir. 1951), 187 F. 2d 557, 40 AFTR 308, cert. denied (1951), 342 U.S. 817;

John L. Sullivan (1952), 17 T.C. 1420, aff'd. (C.A. 5th Cir. 1954), 210 F. 2d 607;

Kessner v. Commissioner, Docket Nos. 53108, 53109, 26 T.C., No. 134 (Sept. 1956), C.C.H. 1956 Reg. Dec. No. 21,924.

B.

THE COURTS HAVE CONSIDERED FOUR FACTORS AS OF MAJOR IMPORTANCE IN DETERMINING "NET EFFECT".

An examination of the cases shows clearly that four factors have been deemed by the Courts to be major factors, of primary importance in determining whether the "net effect" of the distribution is that of a dividend within the scope of Section 115(g), and Petitioner is aware of no cases in which, these factors being present, the Court has failed to hold that the distribution fell within the scope of Section 115(g).

These major factors are:

(1) The distributions have been made entirely from earnings, current or accumulated; and

(2) The distributing corporation has continued in business to substantially the same degree and in substantially the same manner after the distribution as before, manifesting no policy of contraction; and

(3) The control of the corporation and the relationship to the corporation of the shareholder receiving the distribution, as a practical matter, is substantially the same before and after the distribution; and

(4) The distribution and the accompanying redemption of the stock served the purpose of the shareholder receiving the distribution only, and the distributing corporation had no business purpose justifying the making of the distribution and the redemption of its stock.

The foregoing principles are recognized, established, and discussed in the cases heretofore and hereafter cited in this brief.

C.

THE TAX COURT ERRED AS A MATTER OF LAW IN APPLYING THE FOREGOING PRINCIPLES TO THE FACTORS OF THIS CASE.

In the case at bar, the Tax Court gave verbal recognition to the principle that the “net effect” of the distributions is controlling, but failed to apply the principle in the manner in which the principle has been developed in the cases. The Tax Court stated (T.R. 117), “We have considered all of the factors which the evidence discloses.” Petitioner contends that an inspection of the Tax Court’s opinion shows that the Court, on the contrary, did not consider all of the foregoing factors, did not consider their combined effect, did not give sufficient weight to their ex-

istence, but, by contrast, gave disproportionate weight to relatively unimportant factors in this case, and, finally, in deciding that the distribution was one in partial liquidation, made a determination not founded upon substantial evidence.

I. The Distributions Made by Western, the Distributing Corporation, Were Entirely From Current and Accumulated Earnings.

The Internal Revenue Code of 1939 in Section 115(a) defines a dividend as any distribution made by a corporation to its shareholders out of its earnings or profits accumulated after February 28, 1913, or out of the earnings or profits of the taxable year without regard to the amount of the earnings or profits at the time the distribution was made. Section 115(b) of the same Code provides that “for the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits”. Here we have a clear Congressional mandate setting forth that distributions are to be considered from earnings or profits, if available, and are to be considered dividends if from earnings or profits. As the Court said in *Flanagan v. Helvering* (C.C.A. D.C. 1940), 116 F. 2d 937, at page 940:

“The cases, moreover, for the most part involve instances where the present surplus was not in excess of the distribution, although previously profits had been capitalized. Here, there was an earned surplus of \$70,451.49, with current net income of \$10,017.20, the distribution

amounted to \$36,800. For a case like this, the statutory declaration of Section 115(b) leaves little, if any doubt. 'For the purposes of this Act (Chapter) every distribution is made out of earnings or profits to the extent thereof, . . .' The distribution, then, came out of earnings and profits. The force of this statutory mandate must be admitted."

This primary factor of the distribution being out of earnings and the Statutory Mandate thereon were virtually ignored by the Tax Court in its opinion. The opinion merely states at page 117 of the Record that "the mere existence of such earnings and profits to cover the acquisition of the stock does not automatically bring the transaction within the provisions of Section 115(g)."

Of course, the "mere existence" of such earnings and profits has no such automatic effect, as in the case of the complete liquidation of a corporation and the cancellation and redemption of all of its shares, the existence of accumulated earnings would not bring the transaction within the purview of Section 115(g). By the same token, the purchase of all of a shareholder's stock so that the shareholder ceases to have the relationship of shareholder to the corporation, does not automatically fall within Section 115(g). See Regulations 111, Section 29.115-9 (*supra* at page 8) and *Boyle v. Commissioner* (C.A. 3rd Cir. 1951), 187 F. 2d 557. However, the existence of such earnings and profits is an essential element in the application of Section 115(g) since, if such earn-

ings and profits do not exist, the distribution cannot be treated as a taxable dividend by the very terms of the section, and an element so important cannot be dismissed summarily with the mere statement that their "mere existence" has no "automatic" effect. It is submitted that the existence of such earnings does have virtually an "automatic" effect where the other elements considered by the Courts to be important are so plainly present as they are in this case.

In this case there is absolutely no question and no dispute in the evidence that Western not only had very large earned surplus available for the payment of dividends but that the distributions made by Western and in particular the distribution herein issued, were charged directly to earned surplus. The Record shows that Western opened the year 1949 with an earned surplus of \$768,299.64, charged all 1949 distributions, which included the distribution to petitioner, to that earned surplus, reducing it thereby to \$503,756.80 at the end of the year, after which it was further reduced by the 1950 distribution, but remained substantial after all distributions were completed. (Statement of the Case, *supra*, page 5).

No part of these distributions was charged to capital account, as, indeed, would have been impossible, as accumulated earnings were not exhausted by the distributions. Under the circumstances, even if a partial liquidation is made, by the provisions of 115(c) if the amount distributed is not "properly chargeable to capital account," it is considered to be a distribution of earnings and profits. The amounts

distributed in the case at bar were distinctly not "chargeable to capital accounts" and thus were clearly distributions of earnings and profits and therefore within the purview of 115(g) and not 115(c).

Despite the vital importance in this type of case of the existence of accumulated earnings and their distribution to the shareholder, the Tax Court completely failed, as its opinion shows, to give appropriate weight to this indispensable element, and we submit that the Tax Court committed error in this respect. *Fostoria Glass Co. v. Yoke* (D.C.W.V. 1942), 45 F. Supp. 962, 964; *Bazley v. Commissioner of Internal Revenue* (C.C.A. 3d 1946), 155 F. 2d 237, 240, 241; *Commissioner of Internal Revenue v. Roberts* (C.A. 4th Cir. 1953), 203 F. 2d 304, 305, 306; *Kessner v. Commissioner of Internal Revenue*, 26 T.C....., No. 134 (Sept. 1956), C.C.H. 1956 Reg. Dec. No. 21,924.

II. Western, the Distributing Corporation, Continued in Business to the Same Extent After the Redemption as Before.

The cases are in accord with the principle that if the distributing corporation continues in business to substantially the same degree and in substantially the same manner after the redemptions, it is further evidence that the distributions were essentially equivalent to a taxable dividend. *Boyle v. Commissioner* (C.A. 3rd Cir. 1951), 187 F. 2d 557, 561; *Smith v. U. S.* (C.C.A. 3rd 1941), 121 F. 2d 692, 695; *Brown v. Commissioner* (C.C.A. 3rd 1935), 79 F. 2d 73, 74; *Commissioner of Internal Revenue v. Roberts* (supra) 306; *Rheinstrom v. Conner* (C.C.A. 6th 1942), 125

F. 2d 790, 796, cert. denied, 317 U.S. 654, 63 S. Ct. 49, 87 L. Ed. 526 (1942).

In the instant case, Western had been formed in 1935 to engage in the principal activity of the crushing of copra and the manufacture of coconut oil and meal therefrom. It continued to engage in these activities until March 31, 1954, when adverse conditions in the copra market and resulting uneconomic operations caused the company to terminate the copra crushing activities. However, both before and after the distribution, Western's activities were maintained at substantially the same level (T.R. 24). In 1948, Western crushed 25,304,012 pounds of copra, in 1949, 38,249,910 pounds, in 1950, 33,875,264 pounds, in 1951, 47,581,862 pounds, in 1952, 38,907,292 pounds, and in 1953, four (4) years after distribution, Western crushed 26,021,450 pounds of copra, more than the crush of 1948. It is evident that there was no contraction in Western's principal business, namely, copra crushing.

Moreover, as the stipulation of facts also shows (T.R. 24), Western continued to maintain in succeeding years all of its plant and equipment and as shown by Exhibit 10-J (T.R. 43), Western's gross sales actually increased materially after 1948. In 1948, its gross sales were \$5,617,486.61 from which they increased to \$6,551,529.94 in 1951, and in 1953, four (4) years after the distribution, gross sales were \$6,164,545.29, substantially higher than in 1948. It is undeniable, therefore, that the business of Western continued unchanged after the distributions and that

no policy of any sort of contraction was manifested by the corporation.

The Courts, in their reasoning on the question of contraction of business, logically hold that if the business continues after the distribution as before, this factor is of major importance in determining that the "net effect" of the distribution in the shareholder is the same as that of a cash dividend (see citations immediately above).

Nowhere in its opinion does the Tax Court make any mention whatsoever of this factor in the instant case. This evidence, strong and unquestioned, is in complete contradiction of the Court's position that the distributions were distributions in partial liquidation. There is, in fact, no evidence in the record to support such a view, and the Tax Court clearly erred in adopting it.

III. Control of the Corporation and Relative Position of Shareholders Remained the Same.

If the control of the distributing corporation or the relative position of the principal shareholders of the distributing corporation as a practical matter remains the same after the redemption as before, the cases are in general accord in holding this factor as evidence tending to prove that distribution was essentially equivalent to a taxable dividend.

Commissioner v. Roberts (C.A. 4th Cir. 1953),
203 F. 2d 304, 306;

Boyle v. Commissioner (C.A. 3rd Cir. 1951),
187 F. 2d 557, 560.

The Congress in enacting the Internal Revenue Code of 1954 recognized this accord and incorporated the test of continuing control as a limitation on capital gains treatment in Section 302(b)(2)(B).

In *Commissioner v. John T. Roberts* (supra), the Court said at page 306:

“The vital thing here, as we see it, is that by the redemption of this stock the *essential relation* of the taxpayer to the corporation was not, in any practical aspect, changed. Before the redemption he was the sole stockholder in the corporation, after the redemption he was still the sole stockholder. Of what real consequence was it that before the redemption, his sole ownership was divided into 2,000 shares and after the redemption, the same sole ownership was divided into 1,500 shares. He owned the whole corporation before the redemption; after the redemption he was still the sole owner.”

In Respondent's own rulings it is so held: “A redemption of stock which does not, as a practical matter, change the essential relationship between the shareholders and the corporation is generally considered equivalent to a dividend.” Rev. Rul. 56-521.

The Tax Court was in error in ignoring the “net effect” of the transactions in this case, which when properly considered show that the essential control of the corporation and the essential relationship of the shareholders did not change. In its opinion the Tax Court at page 115 of the Record, states:

“The facts show that after Petitioner surrendered 1,346 shares of Western stock, Peti-

tioner's relationship to Western was essentially changed."

The Tax Court's consideration of the control of the corporation ended here. It clearly erred in considering only the redemptions of the corporation to October, 1949, without taking into consideration the subsequent purchase by petitioner of 252 shares from A. A. Schumann in January, 1950. Indeed, this purchase was made with the express intention of preserving Petitioner and A. A. Schumann as controlling shareholders of Western (T.R. 23).

Before the redemptions Petitioner held 40.4 per cent of the voting stock of Western or 2,094 shares out of 5,182 shares. A. A. Schumann held 24.1 per cent of the voting stock of Western or 1,252 shares out of the total of 5,042. Thus, Petitioner and Mr. Schumann controlled the corporation with a total of approximately 64 per cent of its stock, but neither controlled it without the other. In the course of the distributions made to shareholders in 1949 and 1950, Petitioner surrendered only a part of its shares and A. A. Schumann none (T.R. 22-23). At the conclusion of these transactions Western had outstanding 2,000 shares of stock of which Petitioner then owned 748 shares or 37.4 per cent, nearly the same percentage as before the transactions began. However, as A. A. Schumann had surrendered no shares his 1,252 shares, which before the transaction had represented 24 per cent of the outstanding stock, after the transaction represented 62.6 per cent. As the Stipulation of Fact

shows in Paragraph 6 on pages 22-23 of the Transcript of Record, Petitioner, for the purpose of maintaining the same general control of the company between A. A. Schumann and Petitioner, purchases 252 shares from Schumann, after which each held 50 per cent. Therefore, after the transactions, as before, both controlled the corporation, but neither controlled it as against the other. The situation regarding control and the essential relationship of the shareholders was fundamentally unchanged. The Tax Court was patently in error to ignore this situation as it did in its opinion (T.R. 115).

As is apparent from the nearness of time, this purchase was an integral part of the plan for a series of redemptions leaving Petitioner and Schumann still in control of the corporation (T.R. 23). Without the redemptions there certainly would not have been any purchase of A. A. Schumann's stock by Petitioner. Indeed, the only purpose of that purchase was to continue control in the corporation as it had been before the redemptions (T.R. 23).

The redemptions could not be considered separate and apart from the other integral stock transactions in judging the "net effect" of the distributions. *Boyle v. Commissioner of Internal Revenue* (C.A. 3rd Cir. 1951), 187 F. 2d 557, 560.

This factor of control, or relative stockholder position, not properly considered by the Tax Court, has led other courts to find that the redemption was "essentially equivalent to a taxable dividend." The Tax Court erred in not so finding.

IV. In This Case the Redemption of the Stock Served the Purpose of the Shareholders Only and Served No Legitimate Business Purpose.

The Courts are in accord in considering one of the primary factors to be used in determining whether the "net effect" of a corporate distribution is essentially equivalent to a taxable dividend, is whether there is a legitimate business purpose to justify the redemption of stock.

Flanagan v. Helvering (C.C.A. D.C. 1940), 116 F. 2d 937, 939;

Boyle v. Commissioner of Internal Revenue (supra) 561;

Commissioner of Internal Revenue v. Roberts (C.A. 4th Cir. 1953) 203 F. 2d 304, 306;

Smith v. United States (C.C.A. 3rd, 1941) 121 F. 2d 692, 695;

Samuel H. Kessner & Tessie D. Kessner v. Commissioner of Internal Revenue, 26 T.C., No. 134 (Sept. 1956), C.C.H. 1956 Reg. Dec. No. 21,924.

Bazley v. Commissioner of Internal Revenue, (C.C.A. 3rd 1946), 155 F. 2d 237, 241, 244.

In the *Kessner* case (supra), the Court stated:

"Thus, our principal concern is whether the 'net effect' of the transactions involved, absent a real and substantial business reason on the part of the corporation as distinguished from a purpose to benefit the shareholder, was to distribute accumulated earnings and profits among the shareholders the same as if a cash dividend had been declared and paid."

“We readily distinguish our earlier decisions relied upon by petitioners. On those occasions we found that a real and substantial corporate purpose was actually accomplished by the stock redemptions.”

The decision of this case to tax the redemptions as dividends within 115(g) was based primarily upon the finding of no substantial business purpose existing. In all the cases above cited the lack of a legitimate business purpose, such as permitting greater flexibility in financing, or removing restrictions on common stock dividends, was considered an important factor in determining the “net effect” of the distributions.

In the instant case no corporate purpose was served by the distribution of the accumulated profits, but rather the shareholders were served by having accumulated earnings, not needed in the business distributed to them. The corporation retained ample working capital with which to carry on its business (T.R. 42).

The Tax Court in its opinion even acknowledged the lack of any testimony pointing to a legitimate business purpose to justify the distribution (T.R. 117-118). However, the Court apparently considered this a factor weighing in favor of holding the distribution to be a sale or exchange. In this the Court was clearly in error. Properly considered this factor should be of primary importance in determining that the “net effect” of the transaction is that it is essentially equivalent to a taxable dividend. (Cases cited above).

D.

THE TAX COURT, IN DECIDING THAT THE DISTRIBUTION TO PETITIONER WAS A DISTRIBUTION IN PARTIAL LIQUIDATION, MADE A DETERMINATION NOT FOUNDED ON SUBSTANTIAL EVIDENCE.

As pointed out earlier in this brief, the Tax Court gave consideration only to one of the four major factors considered by the Courts to be controlling in this type of case. This one factor was the control of the corporation and the relationship of the shareholder to the corporation before and after the distribution. As shown by the discussion of this factor, beginning at page 18 of this brief, the Tax Court's consideration of this factor was mistaken and the conclusions drawn by the Court erroneous.

The Tax Court appears to have based its main reliance for its decision upon two relatively minor factors, contending that the fact that the corporation had, from time to time over its history, paid ordinary dividends and the fact that the distributions made to the shareholders in 1949 and 1950 were not in the technical sense "pro rata," justified its holding that the distribution to Petitioner was one in partial liquidation.

In the first place, as the cases cited in this brief show, these two elements are, of themselves, of minor importance compared to the major factors previously discussed. Standing alone, they would have no significance in determining whether a distribution was in the nature of a dividend or in the nature of a distribution upon partial liquidation.

So far as dividend payments are concerned, it is perfectly clear that the mere fact that such payments have been made prior to a distribution falling within the scope of Section 115(g)(1) does not automatically convert the latter distribution into a liquidating distribution. In *Rheinstrom v. Conner* (C.C.A. 6th 1942), 125 F. 2d 790, cert. denied, 317 U.S. 654, 63 S. Ct. 49, 87 L. Ed. 526 (1942), a distribution of \$122,000.00 was made to shareholders upon cancellation of stock. This distribution was held to be equivalent to a taxable dividend although, in the same year, the corporation had paid \$90,000.00 in ordinary dividends and had paid other similar dividends over a period of years from 1914 to 1936. These ordinary dividend payments were not considered as in themselves over-riding the effect of 115(g)(1).

A similar situation with similar results occurred in *Kessner v. Commissioner*, 26 T.C., No. 134 (Sept. 1956); C.C.H. 1956 Reg. Dec. No. 21,924. There, a distribution of \$100,000.00 in stock redemption was held to be essentially equivalent to a taxable dividend although the shareholders had already received \$80,000.00 in ordinary cash dividends during the period under review. The Court considered that the payment of ordinary dividends supported rather than detracted from the conclusion that the redemption payments were taxable dividends.

In the instant case, the facts are very similar to both of the cases quoted above. From 1935 through 1949, a period of fifteen (15) years, Western had paid

ordinary dividends in eleven (11) of those years and paid an ordinary dividend in 1949 of \$10.00 per share, amounting to \$50,420.00 (T.R. 41). Yet likewise in 1949, Western made to Petitioner the distribution of \$296,120.00, which is in issue here. Certainly this distribution is not automatically converted into capital gain by the mere fact that Western had followed a normal and usual corporate policy of paying ordinary dividends in other years. Were this true, Section 115(g)(1) would be meaningless, as it could never apply to a purchase of stock by any corporation which had paid ordinary dividends prior to a distribution made upon stock redemption. To make a finding that such a distribution is one in partial liquidation because of the existence of previous ordinary dividend payments is to make a finding unsupported by substantial evidence. This one factor, a minor one, cannot be considered "substantial".

A finding that a distribution otherwise within the purview of 115 (g)(1) is a liquidating distribution merely because it is not "pro rata," is likewise unsupported by substantial evidence. Unless other factors are present, whether a distribution is or is not pro rata is not decisive of the nature of the distribution. It is obvious that distributions unquestionably in complete liquidation of a corporation are normally pro rata; yet this does not bring them within Section 115(g)(1). It is equally obvious from an examination of the cases cited in this brief that the fact that distributions are not pro rata does not necessarily exclude them from the operation of 115(g)

(1). Where mentioned in the cases at all, the element of proration is treated as a minor factor, of little consequence by comparison with the major factors which we previously described, and in two (2) cases, the distribution has been treated as essentially equivalent to a taxable dividend despite the fact that it was not in any sense pro rata. In *Boyle v. Commissioner* (C.A. 3rd Cir. 1951), 187 F. 2d 557, Boyle surrendered to the corporation 3,302 shares of 3,602 owned by him; another shareholder surrendered to the corporation 3,202 shares of 3,502 owned by him; yet Boyle's distribution was considered a taxable dividend. Again, in *McGuire v. Commissioner* (C.C.A. 7th 1936), 84 F. 2d 431, two (2) shareholders received distributions upon cancellation and redemption of the stock and a third shareholder, holding one share, received nothing. This fact did not, in the Court's view, change the character of the distribution from that of a dividend.

The Court said in 84 F. 2d, at page 433: "We think this fact unimportant and in no effect controlling."

If all that were necessary to render 115(g)(1) inapplicable were the absence of pro rata distribution, the effect of 115(g)(1) could easily be avoided by taxpayer-shareholders taking accumulated earnings out of corporations merely by making the distribution not pro rata. Surely such a result was not intended, particularly when other factors are present which have been found by the cases to be controlling. Furthermore, were this true, there would have been no need for Section 115(g)(3), which reads in part as follows:

“Redemption of Stock to Pay Death Taxes.—
The provisions of this subsection shall not apply to such part of any amount so distributed with respect to stock the value of which is included in determining the value of the gross estate of a decedent in accordance with section 811 . . .”

The whole purpose of Section 115(g)(3) is to enable the estate of a deceased shareholder to sell to the corporation in which he owned stock part or all of his stock without encountering the consequences of Section 115(g)(1). Since such a sale would obviously not be made on a pro rata basis, the section is pointless unless it were the plain intention of Congress that 115(g)(1) was not to be denied effect by the mere fact that the transaction involves only one shareholder or less than all shareholders or, in other words, is not pro rata.

It is submitted, therefore, that neither payment of dividends in the past nor the fact that a distribution is not made pro rata among all shareholders nor both in combination can constitute, standing alone, sufficient evidence that the distribution is one in partial liquidation as the obvious effect of such a holding would be to deprive Section 115(g)(1) of all practical effect.

E.

**THE LEADING CASES IN THIS FIELD OF TAX LAW
SUPPORT PETITIONER'S POSITION.**

The cases discussed below, and the cases cited therein, are the leading cases in this field. They support Petitioner's position.

In *Flanagan v. Helvering* (C.C.A. D.C. 1940), 116 F. 2d 937, the Reviewing Court affirmed the Tax Court's decision that monies received by the taxpayer were "essentially equivalent to a taxable dividend." The facts of this case were as follows: the co-executor of an estate holding stock in a corporation also represented all the shareholders of the corporation. By reason of his control position, the co-executor was able to cause 184 shares of the common stock held by the estate to be redeemed and cancelled by the corporation and likewise caused 184 shares held by another shareholder to be redeemed and cancelled. The redemption was treated as within Section 115(g) by the Commissioner, the Tax Court and the Court of Appeals. The co-executor treated the redemption as a partial liquidation within Section 115(c). The Court at page 939 took cognizance of the principal tests that had been determined in placing the transaction within 115(g). The Court noted that "the major part of the capitalization represented former earnings; only two relatively small cash dividends were paid; the principal ownership of the shareholders was not changed; the corporation did not manifest any policy of contraction; the initiative for the corporate distribution

came from a stockholder who needed cash; it has continued to operate at a profit.”

It should be noted that in this case there was a transfer of shares made, prior to the redemption, with the express intent that the shareholders should each hold an equal number of shares.

The usual tests of determining “net effect” were met to support the Court’s opinion. It is interesting to note that in the *Flanagan* case the Court decided against the taxpayer in finding that the distribution was “essentially equivalent to a taxable dividend,” whereas in the instant case, even though the facts are very similar, the Tax Court, deciding again against the taxpayer, found that the distribution was in partial liquidation.

In *Fostoria Glass Co. v. Yoke* (D.C.W.V. 1942), 45 F. Supp. 962, the Court found the acquisition at call price by a corporation of its preferred stock to be “essentially equivalent to a taxable dividend” within Section 115(g). The reacquisition was financed out of current earnings of the company. The Court’s opinion contains the following language in 45 F. Supp. at page 965:

“Following the ‘beacon’ established by these cases, as well as the ‘guiding stars’ pointing thereto, the Court can reach but one conclusion in this case. The issuance and reacquisition of its A and B Preferred stock by Diamond did not result in a diminution of the capital structure. It did not result in a restriction of the company’s business. It was not a partial liquidation. There were in existence no sound business reasons for

the transaction. The cash dividends paid were not commensurate with the net earnings of the company. The capital stock of the company was closely held. The company was at all times possessed of much more cash and negotiable securities than was adequate to meet its operating needs. The Court must, therefore, find that the issuance of this stock by Diamond of Delaware and its reacquisition by that company was substantially equivalent to the distribution of a taxable dividend under the provisions of Section 115(g). Being such taxable dividends, the plaintiff, under the provisions of Section 23(p) of the Revenue Act of 1934, 26 U.S.C.A. Int. Rev. Acts, page 674, is entitled to a dividend received credit for the sums received by it upon the redemption of eleven hundred twenty-five shares (1,125) shares of Series A Preferred stock during its fiscal year ending June 30, 1935, and to dividend received credit of eighty-five per cent (85%) on the amounts received upon the redemption of one thousand (1,000) shares of Series B Preferred stock during its fiscal year ending June 30, 1937."

It is to be noted that in the *Fostoria* case, as in the case before us, the application of the principles enunciated resulted in a substantial reduction in the tax payable due to the application of the dividends—received credit, to which the taxpayer as a corporation was entitled in view of the distributions having been the equivalent of a dividend.

In *Commissioner v. Forhan Realty Corporation* (C.C.A. 2d 1935), 75 F. 2d 268, the taxpayer, a corporation, surrendered its stock in another corporation,

the Forhan Company, receiving cash and other securities therefor. The Forhan Company had ample earnings and profits, undistributed, to cover all of its distribution. Under the statute relating to the transaction, Section 112(c)(2), Revenue Act of 1928, such a distribution could be treated as a taxable dividend if the distribution "has the effect of the distribution of a taxable dividend." The taxpayer, however, being a corporation, was not then taxable on dividends received. The Court of Appeal for the Second Circuit held, nevertheless, that the distribution should be treated as a dividend, even though the result was that no tax was paid. The Court said in 75 Fed. 2d at page 269:

"Where the section refers to a distribution which 'has the effect of the distribution of a taxable dividend,' 'taxable dividend' is to be considered from the viewpoint of the corporation making the distribution, and, where the distribution has the effect of what is ordinarily considered a taxable dividend, from the distributing corporation's viewpoint, section 112(c) (2) is applicable to the entire distribution, without regard to whether there is a possibility of parts of the distribution going to some distributees which parts, if viewed as ordinary dividends, would be nontaxable to such distributees either because the distributees are corporations or because they have not sufficient income to be subject to surtax."

In *Boyle v. Commissioner of Internal Revenue* (C.A. 3d Cir. 1951), 187 F. 2d 557, the Court of Appeals held that the circumstances surrounding the pay-

ment by the company to the taxpayer supported the view of the matter taken by the Tax Court that the "net effect" of the distribution to the Petitioner amounted to a taxable dividend. The distributing corporation, in this case, redeemed a large part, but not all of the shares owned by the taxpayer. The Court stated in 187 F. 2d at page 560:

"All of the other circumstances surrounding the payment by the company to petitioner strongly support the view of the matter taken by the Tax Court that the net effect of the distribution to petitioner amounted to a taxable dividend. The company had never paid any cash dividends. There was no manifestation by it of any policy of contraction or liquidation. The initiative for the distribution came from the majority stockholders. There was, as found by the Tax Court, 'a large earned surplus and an unnecessary accumulation of cash, both of which were reduced as they would have been by the declaration of a true dividend.' "

This case is of primary importance in its recognition of stock transactions, other than the specific redemptions of stock, which were undertaken to continue the control of the corporation the same after the distribution as before. In commenting on this situation the Court said in the same report at page 560:

"Eventually, as already noted, petitioner actually possessed one-third of the company's outstanding stock as he had originally. Certainly there is sufficient evidence to warrant the holding of the Tax Court that the distribution to petitioner, Tiffany, and the Glover Estate was according to a pre-

arranged plan. Commenting on that situation Judge Opper, in his excellent opinion below, said 'Although it took something over a year to accomplish, the upshot was, as our findings show, that a corporation, with three principal stockholders holding their shares in virtually equal proportions, distributed to them the bulk of its accumulated earnings and that ultimately there remained three shareholders again with identical holdings.' "

It should be noted that in this case there was no pro rata redemption and yet the Court held the distribution to be a taxable dividend.

In *Commissioner of Internal Revenue v. Roberts* (C.A. 4th Cir. 1953), 203 F. 2d 304, the Court of Appeals reversed the Tax Court's decision holding that redemption of an entire block of corporate stock formerly owned by taxpayer's brother and bequeathed by him to taxpayer had not consisted of a distribution essentially equivalent to a dividend. The Court of Appeals held that the Tax Court's decision had been erroneous since, inter alia, the taxpayer's essential relationship to the corporation, in which he was sole stockholder, had not been changed in any practical aspect by redemption.

The Appellate Court stated there was little or no dispute about the facts of the case. The earnings and profits of the corporation prior to the redemption were accumulated for no definite purpose; the operations of the corporation were not impaired by reason of the transaction in controversy; the corporation

had never followed a policy of contraction of business, and the corporation continued in the same business in subsequent years. The Court of Appeals noted that the Tax Court found that the payment of \$92,000.00 to the taxpayer was a distribution in complete cancellation and redemption of all of that portion of the corporation's stock bequeathed by taxpayer's brother, and then had erroneously held that this redemption constituted a partial liquidation and was not the essential equivalent of the distribution of a taxable dividend. The Court reasoned that, "The vital thing here, as we see it, is that by the redemption of this stock, the essential relation of the taxpayer to the corporation was not, in any practical aspect, changed." The Court stated in 203 F. 2d at page 306:

"Here, then, we find a single individual owning all the corporate stock. *Flanagan v. Helvering*, 73 App.D.C. 46, 116 F.2d 937; *Bazley v. Commissioner*, 3 Cir., 155 F.2d 237, 239, affirmed 331 U.S. 737, 67 S.Ct. 1489, 91 L.Ed. 1782. The corporation had on hand a large and unnecessary accumulation of cash, representing 'earnings or profits accumulated after February 28, 1913.' *Hirsch v. Commissioner*, 9 Cir., 124 F.2d 24, 29. The corporation did not then intend to liquidate or to contract its business. *Rheinstrom v. Conner*, 6 Cir. 125 F.2d 790, 793, certiorari denied, 317 U.S. 654, 63 S.Ct. 49, 87, L.Ed. 526. The redemption served no business purpose of the corporation; it was motivated entirely by the personal considerations of taxpayer. *Commissioner v. Snite*, 7 Cir. 177 F.2d 819; *Smith v. United States*, 3 Cir., 121 F.2d 692, 695. The net effect of the redemption

was clearly to distribute to taxpayer the corporate earnings just as if a cash dividend had been declared. *Kirschenbaum v. Commissioner*, 2 Cir., 155 F.2d 23, 170 A.L.R. 1389, certiorari denied 329 U.S. 726, 67 S.Ct. 75, 91 L.Ed. 628; *Hyman v. Helvering*, 63 App. D.C. 221, 71 F.2d 342, certiorari denied 293 U.S. 570, 55 S.Ct. 100, 79 L.Ed. 669. See, also, Noland, 'The Uncertain Tax Treatment of Stock Redemptions: A Legislative Proposal, 65 Harv. L. Rev. 255; Pedrick, "Some Latter Day Developments in the Taxation of Liquidating Distributions." 50 Mich.L.R. 529. Indeed, it is difficult to imagine a more ideal set-up for the application of Section 115(g) than the facts involved in the instant case.' "

Indeed, it is difficult to imagine a case more in point than *Commissioner v. Roberts*. Here the Trial Court was reversed, the distribution was held to be a dividend, the facts were not in dispute, and the facts were similar to those in the instant case.

In *Kessner v. Commissioner* (2 cases), Docket Nos. 53108, 53109. 26 T.C., No. 134 (Sept. 1956), C.C.H. 1956 Reg. Dec. No. 21,924, the Tax Court held that a distribution in redemption of stock was made in such time and in such manner as to be essentially equivalent to the distribution of a taxable dividend under Section 115(g) of the 1939 I.R.C. Petitioners' preferred stock was redeemed pro rata by their closely held corporation under circumstances in which (1) there was no diminution of their proportionate interest in the cor-

poration; (2) there was no contraction of the corporation's capitalization or its activities, rather both increased; (3) cash on hand and earnings and profits in substantial amounts were available; (4) no real or substantial corporate business purpose was proved.

The redemption in this case consisted of \$100,000.00 paid for preferred stock which was retired according to its terms. The Court arrived at its decision by applying the primary tests which have been established by judicial precedent. The Court reasoned in its opinion that:

“Congress has broadly advanced the term dividend to include *any distribution* made by a corporation to its shareholders out of earnings and profits. 1939 Code, section 115(a). (Emphasis added). Moreover, as far back as 1926 Congress plugged the loophole whereby in the disguise of a non-taxable cancellation, redemption or partial liquidation of stock ‘a corporation, especially one which has only a few stockholders, might without resorting to the device of a stock dividend, be able to make a distribution to its stockholders which would have the same effect as a taxable dividend.’ ”

“Thus, our principal concern is whether the net effect of the transactions involved, absent a real and substantial business reason on the part of the corporation as distinguished from a purpose to benefit the shareholders, was to distribute accumulated earnings and profits among the shareholders the same as if a cash dividend had been declared and paid. *James F. Boyle*, 14 T.C.

1382 [Dec. 17,721], *affd.* 187 Fed. (2d) 557 (C.A. 3, 1951) [51-USTC Par. 9196]; certiorari denied, 342 U. S. 817; *Smith v. United States*, 121 Fed. (2d) 692 (C.A. 3, 1941) [41-2 USTC Par. 9565]; *Brown v. Commissioner*, 79 Fed. (2d) 73 (C.A. 3, 1935) [35-2 USTC Par. 9526]; *Flanagan v. Helvering*, 116 Fed. (2d) 937 (C.A. D.C., 1940) [40-2 USTC Par. 9710].”

“The decision in each case will depend upon its own particular circumstances. Treasury Regulations 111, section 29.115-9.”

“Secondly, by all of the tests the present transactions are governed by section 115(g). *Flanagan v. Helvering*, *supra*; *Brown v. Commissioner*, *supra*; *James F. Boyle*, *supra*; *Smith v. United States*, *supra*; *Hyman v. Helvering*, *supra*; *Estate of Charles D. Chandler*, *supra*. There was no retrenchment of corporate activities. There was no contraction of corporate invested capital. In fact, both increased. There was no alteration or diminution in petitioners’ proportionate interest in the corporation.”

“The only practical effect of the redemptions was to make cash distributions of corporate earnings and profits pro rata among the shareholders the same as if a dividend in cash had been declared and paid.”

It is of particular importance to note that in this case the Court specifically stressed that the fact that the shareholders had already received nearly \$80,000.00 of cash dividends during the period under review *supported* rather than detracted from the

Court's conclusion that the redemptions were taxable dividends. The Court said:

“The fact that the director-officer-shareholders had already received nearly \$80,000.00 of cash dividends during the period under review supports rather than detracts from our conclusion.”

This use of prior dividends to support the Tax Court's decision that the distributions made in redemption of the stock were essentially equivalent to a taxable dividend points up in a striking manner the weakness of the Tax Court, in the case at bar, relying upon existence of prior dividends to support its decision that the redemptions were made in partial liquidation. The fact that there were prior dividends, it must be remembered, was one of the two factors that the Tax Court cited as supporting its determination. We have already noted that this test is, at best, a secondary test not usually given much weight, and here we have the Tax Court itself citing the existence of prior dividends as support for the view of Petitioner.

CONCLUSION.

It is respectfully submitted that since:

(1) The Tax Court erred as a matter of law in holding that the distribution to Petitioner was not a distribution essentially equivalent to a taxable dividend; and

(2) The decision of the Tax Court that the distribution made in redemption of Petitioner's stock was a distribution in partial liquidation is not based upon substantial evidence;

The decision of the Tax Court in this case should be reversed.

Dated, San Francisco, California.

February 20, 1957.

DUDLEY F. MILLER,
Counsel for Petitioner.

No. 15273

**In the United States Court of Appeals
for the Ninth Circuit**

PACIFIC VEGETABLE OIL CORPORATION, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

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FILED

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Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 77-118) are reported at 26 T. C. 1.

JURISDICTION

This petition for review (R. 119-121) involves federal income taxes for the taxable year 1949. On June 5, 1953, the Commissioner mailed a notice of deficiency to the taxpayer (R. 11-18) and within 90 days thereafter, on August 31, 1953, taxpayer, pursuant to Section 272 of the Internal Revenue Code of 1939, filed a petition in the Tax Court for rede-

termination of this deficiency (R. 3, 4-11). The decision of the Tax Court was entered on April 5, 1956. (R. 118-119.) On July 2, 1956, taxpayer filed a petition for review invoking the jurisdiction of this Court under Section 7482 and 7483 of the Internal Revenue Code of 1954. (R. 119-121.)

QUESTION PRESENTED

Taxpayer owned 2,094 of the 5,182 shares of common stock outstanding of the Western Vegetable Oils Company. In 1949, Western distributed cash in exchange for 1,346 shares of the stock held by taxpayer and in exchange for all of the stock owned by some of the other stockholders. The stock so acquired was then canceled and retired.

¹The question presented is whether the Tax Court clearly erred in holding that the distribution received by the taxpayer was a distribution in partial liquidation within the meaning of Section 115(i) of the Internal Revenue Code of 1939 (and was thus taxable as capital gain, pursuant to Section 115(c) of the Code), as the Commissioner contended, and was not a distribution essentially equivalent to a taxable dividend as provided in Section 115(g) of the Code (and thus was not subject to the dividends received credit of Section 23(b) of the Code) as taxpayer contended.¹

¹ A second issue, involving a change in taxpayer's accounting methods, was decided in favor of the Commissioner (R. 102-113) and has been abandoned by the taxpayer on this appeal (R. 123-124).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are printed in Appendix, *infra*.

STATEMENT

The facts as stipulated (R. 20-25) and found by the Tax Court (R. 79-102) may be summarized as follows:

Pacific Vegetable Oil Corporation (hereinafter called taxpayer) is a California corporation having its principal place of business in San Francisco. It keeps its books by the accrual method of accounting, and makes its income tax returns on the basis of a calendar year. (R. 79.)

Western Vegetable Oils Company, Incorporated (hereinafter called Western), is a California corporation having its principal place of business in San Francisco. The corporation was organized in 1935. It carried on a business of producing vegetable oils from copra and other vegetable oil producing materials, and of selling the oil and the by-products in the United States. As of March 31, 1954, it discontinued its copra crushing operations because of unfavorable economic conditions in the copra crushing industry. The outstanding stock of Western consisted of common stock only. (R. 92.)

At the beginning of 1949, there were outstanding 5,182 shares of Western's stock, and such outstanding stock was held, in various amounts, by 10 stockholders, including the taxpayer who held 2,094 shares, or 40.4091 per cent of the outstanding shares. (R. 92.)

Western's outstanding stock at the beginning of 1949 was held as follows (R. 93) :

<u>Stockholders</u>	<u>No. of Shares</u>	<u>Percentages</u>
Pacific Vegetable Oil Corporation	2,094	40.4091
A. A. Schumann	1,252	24.1605
S. L. Jones & Co. (transferred to W. A. Dow, a shareholder and officer of S. L. Jones & Co. on June 28, 1949)	900	17.3680
R. J. Bommer	250	4.8244
D. S. Burness	178	3.4350
Muriel Burness	178	3.4350
Estate of P. C. Denroche, Deceased	140	2.7016
Thos. A. Allan	140	2.7016
Paul A. Schumann	25	.4824
F. Nelson	25	.4824
TOTAL	5,182	100.0000

Prior to 1949, Western purchased 698 shares of its stock from the Bank of California, as trustee under the will of R. Carl Eddy, Jr., deceased, and 280 shares of its stock from J. H. Thies. It held these 978 shares of stock as treasury stock at the beninning and during part of 1949. (R. 92.)

In April, 1949, the executor of the estate of P. C. Denroche, deceased, advised Western of its desire to sell 140 shares to Western, and asked for bids. Western's directors were authorized to offer the executor \$120 per share. The executor accepted the offer, and Western purchased the 140 shares on April 30, 1949, for \$120 per share. The stock was held as treasury stock, by Western, until after October 18, 1949. (R. 93.)

During October 1949, Western received offers from other stockholders to sell their Western stock to Western for the book value of \$220 per share, as follows (R. 93-94) :

Pacific Vegetable Oil Corp.		1,346	shares
Thomas A. Allan	(all)	140	"
D. S. Burness	"	178	"
Muriel Burness	"	178	"
Paul A. Schumann	"	25	"
F. Nelson	"	25	"
TOTAL		<hr/> 1,892 shares	

These offers to sell were accepted and the purchases for \$220 per share were authorized at meetings of Western's board of directors on October 18, 1949, and October 26, 1949, and the stock was purchased by Western on dates in October and November, 1949, following the directors' meetings. (R. 94.)

At the meeting of Western's directors on October 18, 1949, a resolution was adopted to purchase the stock held by taxpayer and by Thomas A. Allan, in which it was stated that the earned surplus of Western was sufficient to enable the purchases and that it was deemed to be to the best interests of Western to purchase the stock. Statements to the same effect appear in the resolutions which were adopted at the directors' meeting on October 26, 1949, when authorization was given to purchase the stock of D. S. Burness, Muriel Burness, Paul A. Schumann, and F. Nelson. (R. 94.)

At the director's meeting on October 18, 1949, a resolution was adopted authorizing the retirement and cancellation of the 698 shares which had been purchased from the trustee under the will of R. Carl Eddy, Jr., the 280 shares which had been purchased from J. H. Thies, and the 140 shares which had been purchased from the estate of Percy C. Denroche, all of which had been held after the purchases as treasury stock. At the same meeting a resolution was

adopted authorizing the retirement and cancellation of the stock to be purchased from taxpayer and Thomas A. Allan. At the directors' meeting on October 26, 1949, a resolution was adopted authorizing the retirement and cancellation of the stock to be purchased from F. Nelson, Paul A. Schumann, D. S. Burness, and Muriel Burness. (R. 94-95.)

Accordingly, before the end of 1949, Western retired and cancelled 978 shares of stock it had purchased before 1949 and held as treasury stock, and it purchased, retired and cancelled, 2,032 shares of the 5,182 shares which were outstanding at the beginning of 1949. Therefore, at the end of 1949, there were 3,105 shares of its stock outstanding out of the 5,182 shares which had been outstanding at the beginning of the year. (R. 95.)

The stock which was outstanding at the end of 1949 was thus held by 4 stockholders, taxpayer, W. A. Dow, R. J. Boomer, and A. A. Schumann in the following amounts (R. 95-96):

<u>Stockholder</u>	<u>No of Shares</u>	<u>Percentage</u>
A. A. Schumann	1,252	39.75
W. A. Dow	900	28.57
Pacific Vegetable Oil	748	23.74
R. J. Boomer	250	7.94
	<hr/> 3,150	<hr/> 100.00

Western paid to the stockholders from whom it purchased stock during 1949, the total amount of \$433,040 for their stock as follows (R. 96):

Estate of P. C. Denroche	\$ 16,800
Thos. A. Allan	30,800
Pacific Vegetable Oil	296,120
D. S. Burness	39,160
M. Burness	39,160
F. Nelson	5,500
P. A. Schumann	5,500
	<hr/>
	\$433,040

Western paid \$220 per share to each of the above-named stockholders, except to the estate of P. C. Denroche to whom Western paid \$120 per share. (R. 96.)

At a meeting of Western's directors on January 4, 1950, the directors considered offers by W. A. Dow (900 shares) and R. J. Boomer (250 shares) to sell all of their stock to Western, 1,150 shares, at \$220 per share. A resolution was adopted authorizing acceptance of these offers by Western, and the retirement and cancellation of the 1,150 shares upon purchase thereof. After Western purchased and retired the above stock, 2000 shares remained outstanding of which A. A. Schumann held 1,252 shares, and taxpayer held 748 shares. (R. 96-97.)

On or about February 17, 1950, taxpayer purchased from A. A. Schumann 252 shares of Western's stock at a price of \$220 per share. Thereafter, taxpayer and A. A. Schumann each owned 1,000 shares, or 50% of the outstanding shares. (R. 97.)

On or about October 24, 1949, after taxpayer sold 1,346 shares of Western stock to Western, taxpayer's remaining stock, 748 shares, then represented 20.1 per cent of Western's outstanding stock. On or about January 10, 1950, after Western bought the stock of Dow and Boomer, taxpayer's 748 shares represented

37.40 per cent of the then outstanding stock, and the 1,252 shares held by A. A. Schumann represented 62.60 per cent of the outstanding stock. (R. 97.)

At the end of 1948, Western's paid-in surplus was \$69,090, and its earned surplus was \$768,299.64. Western's accumulated earnings and profits exceeded, at all times, the payments it made in 1949 for stock which it acquired from various stockholders. (R. 97.)

Western's net income before taxes, income taxes, and paid dividends for the years 1943 through 1947 were as follows (R. 98):

<u>Year</u>	<u>Net Income Before Taxes</u>	<u>Income Taxes</u>	<u>Paid Dividends</u>
1943	\$ 51,119.43	\$ 450.00	\$ 39,060
1944	65,152.50	38,596.21	11,760
1945	75,656.05	44,020.86	10,364
1946	344,858.23	137,115.08	51,820
1947	1,069,837.49	407,179.51	103,640

Western's net income before taxes, or loss, for the years 1948 through 1953, was as follows (R. 98):

<u>Year</u>	<u>Net Income Before Taxes</u>
1948	\$ 88,573.88
1949	358,814.71
1950	(121,440.87)
1951	106,037.90
1952	(32,403.36)
1953	(52,140.97)

Western declared and paid dividends in 1948 and 1949 in the amounts of \$51,820, and \$50,420, respectively, the latter being a cash dividend of \$10 per share, declared on August 16, 1949. No dividends were paid in 1950. (R. 97, 98.)

Western's cash and earned surplus at December 31 of each of the years 1948 through 1953 amounted to the following (R. 98):

<u>Year</u>	<u>Cash</u>	<u>Earned Surplus—12/31</u>
1948	\$448,201.72	\$768,299.64
1949	238,503.21	503,756.80
1950	54,739.69	129,315.93
1951	84,466.05	233,223.71
1952	54,005.10	198,723.82
1953	48,277.30	142,854.72

The increases or decreases in Western's earned surplus for the years 1946 through 1950 were as follows (R. 98-99):

<u>Year</u>	<u>Earned Surplus Increase or (Decrease)</u>
1946	\$155,923.15
1947	558,104.56
1948	3,095.81
1949	(264,542.84)
1950	(374,440.87)

For the years 1948 through 1950, as of December 31 of each year, Western's gross sales, gross profit or loss, expenses, and net taxable income or loss were as follows (R. 99):

<u>Year</u>	<u>Gross sales</u>	<u>Gross Profit or (Loss)</u>	<u>Business Expenses</u>	<u>Net Taxable Income or (Loss)</u>
1948	\$5,617,486.61	\$214,656.89	\$164,308.51	\$ 88,573.88
1949	4,672,896.09	467,787.70	116,865.38	358,814.71
1950	6,373,894.78	(11,829.73	115,888.12	(121,440.87)
1951	6,551,529.94	200,610.82	94,973.52	106,037.90
1952	5,661,159.15	165,790.02	221,689.16	(32,403.36)
1953	6,164,545.29	121,955.34	225,784.28	(52,140.97)

Western carried on its oil manufacturing and copra crushing business from the beginning of its business in 1935 until approximately March 31, 1954. All plant and equipment owned and maintained by Western prior to 1949 continued to be owned and maintained by Western after 1949 to and including March 31, 1954. (R. 99.)

In its income tax return for the year 1949, taxpayer reported the sum of \$296,120, which it received from Western upon its surrender of 1,346 shares of Western, as a dividend, and took a dividend credit, under Section 26(b) of the 1939 Code, of 85 per cent of the sum received, or \$251,702, which left \$44,418 as taxable income received in 1949 from the transaction. (R. 99-100.)

The Commissioner determined that there was a partial liquidation of Western in 1949; that the taxpayer erred in treating the transaction as a dividend, the \$296,120 which taxpayer received in exchange for 1,346 shares of stock of Western representing a recovery of the taxpayer's cost or basis of the stock to the extent of \$18,832, the cost being about \$13.99 per share; and that, accordingly, the taxpayer realized capital gain in the amount of \$277,288. (R. 99, 100.) Accordingly dividend income of \$296,120 and the offsetting credit of \$251,702 were eliminated from taxpayer's net income and the long-term capital gain of \$277,288 was substituted therefor. (R. 101.)

The Tax Court held that the distribution of Western to taxpayer in 1949, in exchange for the 1,346 shares of Western's stock owned by taxpayer, was a distribution in partial liquidation and was not in whole or in part essentially equivalent to the distribution of a taxable dividend. (R. 102.)

SUMMARY OF ARGUMENT

The Tax Court, sustaining the Commissioner's determination, held that the distribution in redemption of part of the stock held by taxpayer was a dis-

tribution in partial liquidation, within the purview of Sections 115(c) and (i) of the Internal Revenue Code of 1939, and was not equivalent to the distribution of a taxable dividend under Section 115(g). The question is one of fact and the conclusion of the Tax Court should be upheld unless it is clearly erroneous.

The courts have set forth a number of relevant criteria which prove useful in reaching the ultimate factual conclusion as to whether a distribution is in partial liquidation or is essentially equivalent to a dividend, the most important of which is the net effect of the actions taken. However, there is no inflexible and unyielding rule of thumb or weighted formula which may be applied in reaching this factual determination and no one factor is necessarily controlling. The answer, instead, depends upon the peculiar circumstances of each case.

Contrary to taxpayer's assertions, the Tax Court did not err as a matter of law. The Tax Court properly recognized that the net effect of the transaction is the test. The court also correctly observed that no one factor is necessarily controlling, but that, instead, each case turns on its own peculiar facts. In addition, the court carefully considered all the factors which the evidence disclosed, the burden being upon the taxpayer, not the Commissioner, to come forward with the relevant facts.

In determining the net effect of the transaction, the Tax Court properly considered the fact that taxpayer's relationship to the corporation was essentially changed as a result of the distribution. The dividend record of the corporation, and the fact that

the distribution was not pro rata, presented the Tax Court with additional bases for its ultimate conclusion. As the Tax Court further noted, the taxpayer failed to come forward with evidence explaining the purpose of the transaction. The Court recognized the availability of sufficient earned surplus from which to make the distributions and the fact that there was no apparent contraction of business activity by the corporation, but, in effect, considered those factors outweighed by the other factors.

The question on this appeal is not whether this Court would have reached the same conclusion as did the Tax Court, but whether the conclusion of that Court is clearly erroneous. There is substantial support for the Tax Court's conclusion, and this Court should not reweigh the evidence and substitute its own inference.

The cases cited by taxpayer as supporting its position merely set forth the relevant criteria and recognize that each case must necessarily turn on its own facts. They are distinguishable on their facts and accordingly are not controlling here.

ARGUMENT

The Conclusion of the Tax Court that the Distribution In Cancellation of Part of the Stock Held by Taxpayer Was a Partial Liquidation and Was Not Essentially Equivalent To a Dividend Is One of Fact and, Not Being Clearly Erroneous, Should Be Affirmed

Sections 115 (a) and (b) of the Internal Revenue Code of 1939 (Appendix, *infra*) lay down the general rule that any distribution by a corporation to its stockholders is a taxable dividend to the extent that

the corporation has available earnings and profits. Section 115(c) (Appendix, *infra*) carves out an exception to this general rule by providing that distributions in complete or partial liquidation shall be treated as payments in exchange for stock, thus giving rise to capital gain or loss. A distribution in partial liquidation is defined by Section 115(i) (Appendix, *infra*) as meaning a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock. However, the exception set forth with respect to partial liquidations by Section 115 (c) is in turn curtailed by Section 115 (g) (Appendix, *infra*), which taxes as a dividend, to the extent of available earnings, any cancellation or redemption of stock which occurs "at such time and in such manner as to make the distribution * * * in whole or in part essentially equivalent to the distribution of a taxable dividend."

In this case, taxpayer, a corporation, is attempting to convert into a dividend by means of Section 115 (g), what is in fact, under the particular circumstances of this case, a partial liquidation, in order to obtain the advantage of the 85% dividends-received credit available to corporations holding stock in another corporation. (See Sec. 26(b)(1) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed., Sec. 26). It should be noted, however, that the thrust of Section 115 (g) is to prevent distributions in partial liquidation from being utilized to disguise the taxation of a taxable dividend and not necessarily to con-

vert what is in effect a partial liquidation into a dividend. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 49 (1942-2 Cum. Bull. 372, 412); *Rheinstrom v. Conner*, 125 F. 2d 790 (C. A. 6th), certiorari denied, 317 U. S. 654; *Fostoria Glass Co. v. Yoke*, 45 F. Supp. 962 (W. Va.).

The exhaustive decision in *Earle v. Woodlaw*, decided February 28, 1957 (1957 C.C.H., par. 9472) sets forth the most recent pronouncement of this Court with respect to the question of whether a distribution is in partial liquidation or is substantially equivalent to a dividend. In the *Woodlaw* case it was stated:

Before we consider the law applicable to the facts of this instant case, we must first recognize that "most of the cases arising under Sec. 115 (g) are of little value in the determination of the question instantly presented, for the reason that each depends for its solution upon its own peculiar facts."

It is thus well-established that the question in this case is one of fact, dependent upon the particular circumstances of each case. See also, *Hirsch v. Commissioner*, 124 F. 2d 24 (C. A. 9th); *Jones v. Griffin*, 216 F. 2d 885 (C. A. 10th); *Woodworth v. Commissioner*, 218 F. 2d 719 (C. A. 6th); Treasury Regulations 111, Sec. 29.115-9 (Appendix, *infra*.)

The Tax Court in the instant case found that the transaction in question did not have the equivalence of a taxable dividend under Section 115 (g). This ultimate conclusion, being factual, will be reversed only if clearly erroneous. *Earle v. Woodlaw*, *supra*;

Estate of Chandler v. Commissioner, 228 F. 2d 909 (C. A. 6th); *Smith v. United States*, 121 F. 2d 692 (C. A. 3d); Section 7482 (a) of the Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. II, Sec. 7482); Rule 52(a) of the Federal Rules of Civil Procedure. See also, *United States v. Yellow Cab Co.*, 338 U. S. 338, 340, 342; *United States v. Gypsum Co.*, 333 U. S. 364, 394, 395, rehearing denied, 333 U. S. 869; *Vesper Co. v. Commissioner*, 131 F. 2d 200 (C. A. 8th).

In addition to setting forth the foregoing principles, this court, in the *Woodlaw* case, *supra*, further stated:

“In determining whether a transaction is equivalent to a taxable dividend within Section 115 (g), or whether it is a partial liquidation under 115 (c), neither the Board of Tax Appeals nor the courts have laid down a sole decisive test.” *Flanagan v. Helvering*, D. C. Cir., 116 Fed. (2d) 937.

The cases do, however, lay down certain “judicial criteria,” as Judge Vinson described them in the *Flanagan* case, which have proven useful in coming to a conclusion as to whether Sec. 115 (g) is applicable. These are:

1. Did the corporation adopt any plan or policy of contraction of its business activities?
2. Did the corporation follow an orderly procedure looking toward its ultimate dissolution, or its ultimate contracted operation?
3. Did the initiative for the corporate distribution come from the corporation, based on usual business considerations, or did it come from stockholders, (or a stockholder), for their (or his) own purpose?

4. Is the proportionate ownership of stock by the shareholders changed?

5. What were the amounts, the frequency and the significance of dividends paid in the past?

6. Does the capitalization, at the time of cancellation of the stock, represent capital paid in, or earnings from the business?

7. Was there a sufficient accumulation of earned surplus to cover the distribution, or was it partly from capital?

8. Was there a maintenance of a relatively similar amount of capital liability, or did that figure decrease to a degree somewhat comparable to the purported distribution of capital?

9. Was there good faith, or bad, in the action of the Board of Directors?

10. What was the net effect of actions taken?

This last criteria is that of most importance. And, as the court stated in *Jones v. Griffin*, supra, at p. 887:

No inflexible and unyielding rule of thumb has been devised for ready use in determining in every instance whether a transaction constituted a partial liquidation within the scope and meaning of section 115 (c), or was the equivalent of a taxable dividend within the purview of section 115(g). A critical examination of the statute as a whole negates the suggestion that a weighted formula can resolve the crucial question in every case.

Taxpayer, the Commissioner and this Court apparently agree that the basic test is the net effect of the transaction. (See Pet. Br. 10-11.) It is also apparent that the four factors which taxpayer asserts

are of importance (Br. 11-12) are relevant in determining whether a distribution is essentially equivalent to a dividend or is a partial liquidation. However, the Commissioner contests the implication that the four factors enumerated by taxpayer are the only factors of (Br. 11) "primary" or "major" importance and also contests the assertion that the Tax Court gave disproportionate weight to what the taxpayer submits as (Br. 12-13) "relatively unimportant" factors. As already noted, there are any number of factors and circumstances which are relevant and which may be present in innumerable combinations; there is no "rule of thumb" which may be applied in reaching this factual determination and no one factor is controlling. The answer depends on the peculiar circumstances of each case.

Taxpayer asserts that the Tax Court erred as a matter of law. (Br. 12.) However, it is clear that the Tax Court committed no error of law in this case. The Tax Court, in arriving at its ultimate conclusion, properly recognized that the net effect of the transaction is to be considered. The Court correctly observed that no one factor is controlling, but that, instead, each case turns in its own facts. In addition, the Court carefully stated that it considered all the relevant factors which the evidence disclosed.² The issue before the Tax Court was purely factual and the only

² At this point, it should be noted that the determination of the Commissioner is *prima facie* correct and the burden is on the taxpayer to prove the existence of any factors in its favor in order to prove the determination incorrect. *Hirsch v. Commissioner, supra.*

question on this appeal is not whether the Tax Court erred as a matter of law, but whether the finding of the Tax Court is clearly erroneous. We submit that there is substantial evidence to support the Tax Court's finding that the distribution to taxpayer, in view of all the circumstances of this particular case, constituted a distribution in partial liquidation and was not substantially equivalent to a taxable dividend.

Turning to the facts surrounding the transaction in question, prior to 1949, Western held 978 shares of its stock, as treasury stock, which it had purchased from two of its shareholders, these shareholders ceasing to have any interest in the affairs of Western. At the beginning of 1949, the remaining outstanding stock of Western was held by ten stockholders: taxpayer held 2,094 shares (approximately 40 per cent of the outstanding stock); A. A. Schumann held 1,252 shares (approximately 24 per cent of the outstanding stock); and eight other stockholders held the remaining 1,836 shares (approximately 36 per cent of the outstanding stock) in varying amounts. (R. 92-93.)

In April, 1949, the estate of one of the stockholders offered to sell all of the 140 shares held by the deceased stockholder to Western. It being deemed in the best interest of Western, the corporation purchased the shares for \$120 per share and held them as treasury stock. (R. 26-27, 93.)

In October, 1949, Western received an offer from taxpayer to sell 1,346 of its 2,094 shares. At the same time, Western received an offer from one of the other stockholders, Thomas A. Allan (who was also a director of Western), to sell all of the 140 shares

held by him. The offering price for taxpayer's and Allan's shares was the book value thereof, \$220 per share. On October 18, 1949, the Board of Directors of Western accepted the offers, stating that such acceptance was to the advantage and best interests of Western, and authorized the purchase of the shares from taxpayer and Allan. At the same time, the directors authorized the retirement and cancellation of the shares held as treasury stock and also of the shares just purchased. (R. 28-32, 93-95.)

On October 26, 1949, the Board of Directors of Western met to consider additional offers to sell outstanding shares of its stock held by four other shareholders (Paul A. Schumann, F. Nelson, Muriel D. and Donald S. Burness). Each offered to sell all of his or her shares for the book value thereof, \$220 per share. (Paul A. Schumann and Nelson owned 25 shares each and the Burnesses owned 178 shares each.) This offer was accepted by the directors and it was further resolved to retire and cancel the shares so acquired, both the purchase and the cancellation expressly being to the advantage and best interests of Western. (R. 32-35.)

On January 4, 1950, the directors met to consider offers by R. J. Boomer and William A. Dow, Jr. who were directors of Western and were two of the four remaining shareholders to sell all of the shares they held in Western for the book value of \$220 per share (Boomer owned 250 shares and Dow owned 900 shares). The directors accepted the offer and further resolved to cancel the shares, once again stating such action to be to the advantage and best interests of Western. (R. 35-38.)

At this point, only taxpayer and A. A. Schumann remained as stockholders, the former holding 748 shares (37.4 per cent of the 2,000 remaining outstanding shares) and the latter holding 1,252 shares (62.6 per cent of the 2,000 remaining outstanding shares). Then, on or about February 17, 1950, taxpayer purchased 252 shares directly from A. A. Schumann, with the result that each then held 1,000 of the 2,000 shares outstanding. (R. 97.)

During this entire series of transactions, no distributions by Western were made to A. A. Schumann in consideration for the purchase and cancellation of any of the stock held by him. Cash dividends, however, of ten dollars per share were paid in 1948 and on August 16, 1949, to all stockholders of record (R. 97, 98) and dividends were paid in the years 1943-1947, inclusive, in the respective amounts of \$39,060; \$11,760; \$10,364; \$51,820; and \$103,640 (R. 98).

It is undisputed that the distribution to taxpayer was in complete cancellation and redemption of a part of Western's stock. (R. 95.) This fact alone, of course, does not preclude Section 115 (g) from operating to cause treatment of the distribution as a dividend, but merely places it within the definition of Section 115 (i).³ Similarly, there is no dispute that there was sufficient earned surplus available from which to make the distributions in 1949 and

³ The first part of the definition of the term "amounts distributed in partial liquidation" is " * * * a distribution by a corporation in complete cancellation or redemption of a part of its stock." Sec. 115 (i) of the Internal Revenue Code of 1939.

the exhibits to the stipulation indicate that such distributions were charged to earned surplus (Ex. 8-H, R. 41; Ex. 9-I, R. 42). It also appears that there was, in fact, no contraction in the business or operating assets of Western from the time of the distribution, in 1949, until the business ceased operations in 1954, due to unfavorable conditions in the copra crushing industry. (R. 21, 99.) These are admittedly relevant factors to consider, but they are not conclusive, *per se*, of the ultimate factual issue.⁴ As the Tax Court properly noted (R. 117), no one factor is controlling. The Tax Court did not ignore these factors, but, instead, expressly recognized them (R. 116-117). The court, in effect, held that other factors present in the particular circumstances of this case, particularly the net effect of the essential change of taxpayer's relationship to the corporation, outweighed the existence of earnings and lack of contraction of business.

The Tax Court placed particular emphasis on the net effect of the transaction in question, specifically noting that taxpayer's relationship to Western was essentially changed after the distribution in question. (R.115-116.)⁵ Prior to the series of distributions,

⁴ The fact that a distribution is out of earnings is merely one of many relevant factors to be considered, as taxpayer recognizes. Similarly, the lack of a policy of contraction does not, in and of itself, preclude the distribution from being one in partial liquidation. See *Yankey v. Commissioner*, 151 F. 2d 650 (C. A. 10th).

⁵ Thus the Tax Court recognized the fourth and tenth criteria listed by this Court in the *Woodlaw* case (i.e., whether the proportionate ownership of stock by the shareholders changed and the net effect of actions taken).

taxpayer held approximately 40 per cent of the stock in Western. Immediately after the distribution in exchange for part of the stock held by taxpayer, on October 18, 1949, taxpayer held approximately 20 per cent of the shares outstanding. (R. 115-116.) And if, as taxpayer asserts (Br. 21), and the Commissioner agrees, the series of integral stock transactions amounted to a plan, the net effect was that taxpayer ultimately held equal control of Western, whereas before the series of redemptions, and the subsequent direct purchase of stock by taxpayer from A. A. Schumann,⁶ taxpayer controlled only 40 per cent of the stock. The Tax Court was certainly justified in considering this a significant change in the proportionate ownership of Western.⁷ Furthermore, the net effect of the over-all plan of distributions significantly changed the structure of stockholdings. Prior to the distributions, there were ten stockholders, eight of

⁶ The record does not disclose the relationship between taxpayer and A. A. Schumann.

⁷ This case thus differs factually from *Commissioner v. Roberts*, 203 F. 2d 304 (C. A. 4th); *Boyle v. Commissioner*, 187 F. 2d 557 (C. A. 3d); and *Kessner v. Commissioner*, 26 T. C. No. 134, relied upon by taxpayer (Br. 18-21, 32-39.) The *Roberts* case (as did the *Woodlaw* case, *supra*) presented a fact situation in which there was a sole stockholder. Naturally, any redemption in that situation would not affect the relative position and control of the stockholder with respect to the corporation. In the *Boyle* case, there were three stockholders, each holding one-third of the shares; after the redemption of three stockholders remained in the same relative position, each holding the same one-third interest. Similarly, in the *Kessner* case, there was no change in the proportionate holdings.

whom held about 36 per cent of the stock, and who, together with either taxpayer or A. A. Schumann, could control the company. After the series of redemptions, these eight stockholders were no longer on the scene and there remained only taxpayer and A. A. Schumann, each holding 50 per cent of the stock, or equal control of Western. All of these transactions, which taxpayer recognizes as an integral part of an over-all plan, were found by the Tax Court to be bona fide, arm's-length transactions (R. 116) and had the net effect of materially altering the ownership and control of Western.

The Tax Court also noted the dividend record of Western as further proof that the distribution in question was not essentially equivalent to a dividend. (R. 117.) Taxpayer's criticism of the Tax Court (Br. 24-28) with respect to the Court's consideration of the prior dividends (as well as with respect to the Court's consideration of a lack of a pro rata distribution) does not fairly present the Tax Court's opinion. The Tax Court did not base its main reliance on these factors, but instead (1) noted that no one factor is controlling, (2) stated that it considered all of the factors which the record disclosed and then (3) noted these as among the factors in question. Taxpayer attempts to set up a hierarchy of four major factors and relegate others to a "minor" status. The fact is that *all* of the factors have some degree of relevance. This Court, in the *Woodlaw* case, *supra*, expressly recognized the relevancy of an examination of the amounts, frequency and significance of past dividends. Here, Western had paid dividends amount-

ing to \$10 per share in 1948 and 1949 and had consistently paid substantial dividends since 1943 (R. 98.) There is nothing to show, as in the *Woodlaw* case, that Western, for the convenience of the shareholders, failed to pay dividends when the corporation would ordinarily have done so.

With respect to the fact that the distributions were not pro rata, the presence of a pro rata distribution is of course strong evidence that the distribution is equivalent to a dividend, since the net effect is to leave the stockholders in the same relative position. Indeed, even a non-pro rata distribution may be essentially equivalent to a dividend. See *Boyle v. Commissioner*, 187 F. 2d 557 (C.A. 3d); *Kessner v. Commissioner*, *supra*. However, while it is not conclusive, the fact that a distribution is not pro rata may properly be considered a factor indicative of a liquidation rather than a dividend distribution. Here, the fact that A. A. Schumann received no comparable distribution fits the general plan of redemption of stock whereby taxpayer and Schumann achieved equal ownership and control of Western, and the Tax Court was not in error in noting it as relevant.

Finally, with respect to whether the stock redemption served a business purpose of the corporation as contrasted with a benefit accruing solely to the stockholders, it should again be noted that throughout the consideration of all the factors in this and similar cases, the Commissioner's determination is *prima facie* correct and the burden is on the taxpayer to prove the existence of factors in its favor in order to prove the determination incorrect. *Rheinstrom v.*

Commissioner, supra; Hirsch v. Commissioner, supra. The corporate minutes in the case of each distribution and cancellation expressly state that such action was to the advantage and best interest of Western (R. 27, 29, 31, 33, 34, 37.⁸ The Tax Court noted that there is no evidence or testimony relating to these transactions which would explain them (R. 117-118).

Taxpayer finally states that the leading cases support its position (Br. 29-39.) However, the cases merely set forth relevant criteria, which the Tax Court considered, and recognize that each case must turn on its own facts. Accordingly, other decisions are of little value in the determination of the issue in this and similar cases. *Earle v. Woodlaw, supra.* Furthermore, as already discussed, the cases are clearly distinguishable from the instant case.

⁸ In *Kessner v. Commissioner, supra* (relied upon by taxpayer), the Tax Court, in holding the distribution to be a dividend, noted that the minutes of the directors' meeting contained no expression of a business purpose. It might also be noted that where the corporation is closely held, it is often difficult to distinguish a corporate from a stockholder's purpose. *Keefe v. Cote*, 213 F. 2d 651, 657 (C.A. 1st).

CONCLUSION

It is submitted that, on the particular facts of this case, the ultimate conclusion of fact by the Tax Court was not clearly erroneous and should be affirmed.

Respectfully submitted,

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APRIL, 1957

APPENDIX

Internal Revenue Code of 1939:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) [As amended by Sec. 166 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Definition of Dividend.*—The term “dividend” when used in this chapter (except in section 201 (c) (5), section 204 (c) (11) and section 207 (a) (2) and (b) (3) (where the reference is to dividends of insurance companies paid to policy holders) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

(b) *Source of Distributions.*—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

(c) [As amended by Sec. 147 of the Revenue Act of 1942, *supra*] *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed (whether before January 1, 1939, or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsection (h) of this section are applicable) the part of such distribu-

tion which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. * * *

* * * * *

(g) *Redemption of Stock*.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * * *

(i) *Definition of Partial Liquidation*.—As used in this section the term “amounts distributed in partial liquidation” means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * * * *

(26 U.S.C. 1952 ed., Sec. 115.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.115-5. *Distributions in Liquidation*.—Amounts distributed in complete liquidation of a corporation are to be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation are to be treated as in part or full payment in exchange for the stock so canceled or redeemed. The gain or loss to a shareholder from a distribution in liquidation is to be determined as provided in section 111 and section 29.111-1, by comparing the amount of the distribution with the cost or other basis of the stock provided in section 113; but the gain or loss will be recognized only to the extent pro-

vided in section 112, and shall be subject to the conditions and limitations provided in section 117.

The term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock. A complete cancellation or redemption of a part of the corporate stock may be accomplished, for example, by the complete retirement of all the shares of a particular preference or series, or by taking up all the old shares of a particular preference or series and issuing new shares to replace a portion thereof, or by the complete retirement of any part of the stock, whether or not pro rata among the shareholders.

In the case of amounts distributed in partial liquidation, the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of section 115(b) for the purpose of determining taxability of subsequent distributions by the corporation. (See sections 29.27(g)-1 and 29.115-11.)

* * * * *

Sec. 29.115-9. *Distribution in Redemption or Cancellation of Stock Taxable as a Dividend.*—

If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

The question whether a distribution in connection with a cancellation or redemption of stock

is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. A bona fide distribution in complete cancellation or redemption of all of the stock of a corporation, or one of a series of bona fide distributions in complete cancellation or redemption of all of the stock of a corporation, is not essentially equivalent to the distribution of a taxable dividend. If a distribution is made pursuant to a corporate resolution reciting that the distribution is made in liquidation of the corporation, and the corporation is completely liquidated and dissolved within one year after the distribution, the distribution will not be considered essentially equivalent to the distribution of a taxable dividend; in all other cases the facts and circumstances should be reported to the Commissioner for his determination whether the distribution, or any part thereof, is essentially equivalent to the distribution of a taxable dividend.

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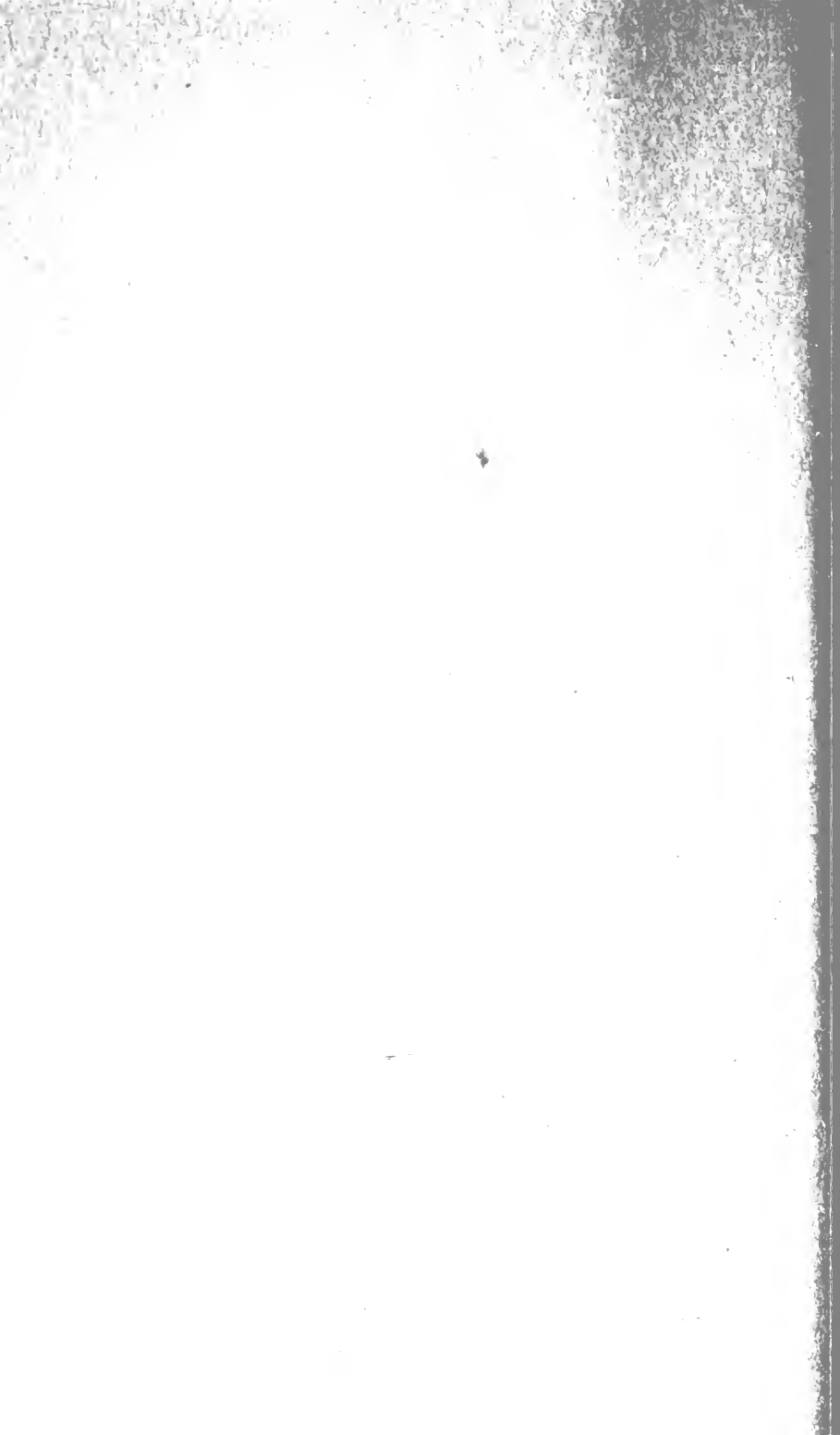
IN THE

**United States Court of Appeals
For the Ninth Circuit**

PACIFIC VEGETABLE OIL CORPORATION,	}
<i>Petitioner,</i>	
VS.	
COMMISSIONER OF INTERNAL REVENUE,	
<i>Respondent.</i>	}

REPLY BRIEF OF PETITIONER.

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No. 15,273

IN THE

United States Court of Appeals
For the Ninth Circuit

PACIFIC VEGETABLE OIL CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONER.

PRELIMINARY STATEMENT.

Petitioner respectfully refers the Court to its opening brief for statements regarding jurisdiction and other relevant matters. It is intended that this Reply Brief will discuss primarily the Brief of the Respondent and the case of *Earle v. Woodlaw* decided by this Court on February 28, 1957 (1957, C.C.H. Par. 9472), some eight days after the filing of Petitioner's Opening Brief.

THE TAX COURT ERRED AS A MATTER OF LAW IN DECIDING THAT THE DISTRIBUTIONS MADE BY THE CORPORATION IN THIS CASE WERE ESSENTIALLY EQUIVALENT TO A TAXABLE DIVIDEND. THE TAX COURT DECISION IS CLEARLY ERRONEOUS, BEING CONTRARY TO THE EVIDENCE, AND SHOULD BE REVERSED.

It is of course generally held that the question of whether a corporate distribution is a liquidating dis-

tribution under Section 115(c) of the Internal Revenue Code or is essentially equivalent to the distribution of a dividend under Section 115(g) is a question of fact.

Nevertheless, when the answer to a question, nominally one of fact, is dependent upon the legal interpretation of, and the application of, statutory regulations and decisions, the inquiry moves into the realm of law, not fact. Thus, the cases are in equally general agreement that the ultimate conclusion reached by a Trial Court on such a question can be reversed when clearly erroneous, which necessarily involves the concept of error of law as applied to the facts before the Court.

This case presents a typical example. In the Findings of Fact and Opinion of the Tax Court (T.R. 77), the Court makes the "finding" that the distribution in question in this case was a distribution in partial liquidation and not a distribution "essentially equivalent to the distribution of a taxable dividend" (T.R. 102). Although designated as a Finding of Fact, it is impossible to avoid the conclusion that this finding is at least a combined finding of fact and conclusion of law, if not purely a conclusion of law (Cf. *Thornley v. C.I.R.*, 147 Fed. (2d) 416; *Earle v. Woodlaw*, 1957 C.C.H., Par. 9472, Pg. 56,899). It is thus completely reversible if erroneous as a matter of law or as an application of the law to the facts involved.

The petitioner contends that the Tax Court erred as a matter of law and should be reversed in that it failed properly to consider all of the "judicial criteria" established by the decided cases in this field,

failed to give proper weight to important factors in the case, failed to interpret the facts correctly in the light of judicial precedent and statutory provisions and finally, failed to base its decision upon substantial evidence.

There are certain definite factors which are relevant in distinguishing between a distribution which constitutes the essential equivalent of a taxable dividend under Section 115(g) and a distribution which constitutes a partial liquidation under Section 115(c). Accordingly, we shall discuss these factors as they apply to the facts in this case, and will show how the Tax Court, in improperly considering the evidence, was clearly erroneous in its findings and conclusions and ultimately in its decision.

Merely because the Tax Court asserted in its opinion that it had considered all relevant factors cannot preclude review and reversal. For a litigant to be barred on appeal by such a formula would result in the Trial Court's immunity from reversal upon a mere self-serving assertion. Surely this is not a tenable proposition.

AS JUDGED BY THE "JUDICIAL CRITERIA" LAID DOWN BY THE COURTS, THE DISTRIBUTION IN THIS CASE SHOULD BE HELD TO BE ESSENTIALLY EQUIVALENT TO A DIVIDEND AND THE TAX COURT FAILED TO PROPERLY CONSIDER AND APPLY THESE CRITERIA.

In the very thorough decision of this Court in *Earle v. Woodlaw*, decided February 28, 1957, C.C.H. Par. 9472, the Court reversed the Trial Court's decision

which had held that a distribution similar to the one in the instant case had been in partial liquidation. In arriving at this result the Court, in an opinion written by Judge Barnes, considered the various "judicial criteria" which have proven useful in coming to a conclusion as to whether Section 115(g) is applicable.

As this opinion is the latest pronouncement of this Court with respect to this question and in an effort to assist the Court in arriving at its decision in this case, Petitioner will now consider the factors mentioned in *Earle v. Woodlaw*.

1. Did the corporation adopt any plan of contraction of its business activities?

The answer here is obviously that it did not. Both before and after the distribution Western's activities were maintained at substantially the same level (T.R. 24). In 1948 Western crushed 25,304,012 pounds of copra, in 1949 (the year of the distribution) 38,249,910 pounds, in 1950, 33,875,264 pounds, in 1951, 47,581,862 pounds, in 1952, 38,907,292 pounds, and in 1953 (four years after distribution) Western crushed 26,021,450 pounds of copra, more than the crush of 1948. It is evident that there was no contraction in Western's principal business, namely copra crushing. Respondent concedes this in its Brief at page 21.

Moreover, Western continued to maintain in succeeding years all of its plant and equipment and, as shown by Exhibit 10-J (T.R. 43), Western's gross sales actually increased materially after 1948.

Concerning this factor, in its Opinion the Tax Court merely states that in order to be a partial liquidation it is not necessary that the corporation be planning a cessation of business or be in the process of final liquidation (T.R. 116-117). Such a sideward glance can hardly be called "recognition" of the factor of lack of contraction of Petitioner's business as claimed by Respondent (Brief page 21). The Tax Court did not discuss contraction but only complete cessation. The Tax Court was clearly erroneous in its consideration of these facts and should be reversed.

2. Did the corporation follow an orderly procedure looking toward its ultimate dissolution, or its ultimate contracted operation?

Again, the answer here is obviously that it did not. The corporation continued to operate after the distribution in question and in the year 1951 earned \$106,-037.90 as compared to a profit in 1948, the year prior to the distribution, of \$88,573.88 (T.R. 43). Thus, it can be seen that a greater profit was made after the distributions than prior thereto and, as mentioned above, on a larger volume of business. It was not until 1954, five years after distribution, that unforeseen severely adverse conditions in the copra industry forced Western to discontinue its business.

3. Did the initiative for the corporate distribution come from the corporation, based on usual business considerations, or did it come from the stockholders, for their own purposes?

In the instant case no corporate purpose was served by the distribution of accumulated profits, but rather the shareholder solely was served by having accumu-

lated earnings not needed for the business distributed to it. The corporation retained ample working capital with which to carry on its business (T.R. 42).

Respondent in its Brief (page 25) asserts that the corporate minutes in the case of each distribution and cancellation expressly state that such action was to the best interests of the corporation. At best such a statement in the corporate minutes is purely routine and commonly made in respect of any action by directors involving corporate assets. It does not constitute any evidence of any particular corporate purpose and should be judged in the light of the actual needs of the corporation and the stockholders.

Petitioner contends that it is apparent from all the evidence in the record, including the large amount of earned surplus, the wholly adequate working capital, the expanding business and the paucity of dividends, that the shareholder's purpose was being served by this distribution and not the corporation's. There simply are no actual business considerations revealed in the record which would indicate that any business purpose was served by the distribution, whereas the record is replete with considerations pointing to the fact that the purpose of the stockholders was served.

4. Is the proportionate ownership of stock by the shareholders changed?

Though the proportionate ownership of stock among all shareholders was changed, the essential relation of the *Petitioner* to the distributing corporation, as a practical matter, remained the same after the redemp-

tion as before. This test, which was adopted by the Court in *Commissioner v. John T. Roberts*, C.A. 4th Cir., (1953), 203 F. 2d 304, is met in this instance. The Court in that case stated at page 306:

“that by the redemption of this stock the *essential relation* of the taxpayer to the corporation was not, in any practical aspect, changed.”

In Respondent's own rulings, as pointed out in our Opening Brief, (page 19) the test is that of the *Roberts* case. Respondent devotes a great deal of attention to this aspect of this case and insists that the Tax Court was justified in considering that a significant change had occurred in the taxpayer's relationship to the corporation. The Tax Court specifically found and held in its Opinion (T.R. 115) that Petitioner's relationship to Western was essentially changed. This simply is not the fact.

Prior to these distributions and redemptions, Petitioner, without combining with either A. A. Schumann or other minority shareholders, was unable to control the corporation. After the redemption, Petitioner, without combining with A. A. Schumann, was unable to control the corporation. Petitioner's essential relationship to the corporation thus was not, in any practical aspect, changed. The Tax Court and Respondent are clearly in error in their analysis of this relationship. The test, as the *Roberts* case shows, is not one of precise mathematical proportion, but of “essential” change as a “practical matter.” The rationale of this criteria is that if, as a practical matter, the taxpayer has the same basic relationship with the corporation

after a distribution as before, the distribution is equivalent to an ordinary dividend, which, of course, leaves the shareholder in the same position after as before the dividend. In the instant case, the shareholder, Petitioner, was in the same position after as before the distribution relative to the distributing corporation. Though the precise structure of the stock holdings in the distributing corporation changed, the essential relationship of Petitioner to the corporation had not changed in any practical sense.

5. What were the amounts, the frequency, and the significance of dividends paid in the past?

From 1935 through 1949, a period of fifteen years, Western had paid ordinary dividends in eleven of those years, but without regularity. An ordinary dividend was paid in 1949 of \$10.00 per share, amounting to \$50,491.00 (T.R. 41). However, even though paying dividends Western had accumulated large amounts of earned surplus amounting to \$768,299.64 in 1948 (T.R. 42), an amount far in excess of all dividends paid in all its history. As Petitioner was able to conduct its business in 1950, after the distribution, at an increased rate of sales on an earned surplus of only \$129,315.93 (T.R. 42, 43), it is apparent that the accumulation in 1948 was excessive. As this Court pointed out in *Earle v. Woodlaw*, the declaration of dividends over a period of years is not significant if an unreasonable amount of earned surplus is also being accumulated. The Court also pointed out that this seems to meet the indicia discussed in *Commissioner v. Roberts*, 4 Cir., 203 F. 2d 304, where there

was a finding that “there had been an accumulation by the corporation for no definite purpose; that there was on hand a large and unnecessary accumulation of cash representing earnings.”

Respondent, in its Brief (page 23), asserts that the Tax Court did not base its main reliance on this factor of dividend payments. Petitioner contends that the Tax Court not only did rely heavily upon this factor but also that the Tax Court clearly erred in its consideration of the factor, in that it did not consider them in relation to the large accumulation of earned surplus nor in the light of the decided cases.

6. Does the capitalization at the time of the cancellation of the stock represent capital paid in, or earnings?

The record shows that at the time of the cancellation of the stock the capitalization of Western was represented by a capital stock account of \$62,300.00, a paid-in surplus account of \$69,090.00, and an earned surplus account of \$768,299.64 (Dec. 31, 1948, T.R. 42). After the cancellation the respective figures were \$62,300.00; \$69,090.00, and \$129,315.93 (T.R. 42).

7. Was there a sufficient amount of earned surplus to cover the distribution, or was it purely capital?

The record is absolutely clear on this question. The distribution was from accumulated net income, classified as earned surplus on the books of the corporation (Respondent's Brief 20-21). The Tax Court's "recognition" of this factor (T.R. 117) can hardly be held to be more than a statement of a broad undeniable

rule. It certainly was not a discussion of the existence of earned surplus and its meaning in this case.

8. Was there a maintenance of a relatively similar amount of capital liability, or did that figure decrease to a degree somewhat comparable to the purported distribution of capital?

In the instant case the capital account of Petitioner was the same on its balance sheet both before and after the distribution in question. In this respect, the distribution was again essentially equivalent to a dividend. The Tax Court does not "recognize" this factor once in its opinion.

9. Was there good faith, or bad, in the action of the Board of Directors?

There is no evidence in the record bearing upon the question of the good faith of the Board of Directors.

10. What was the net effect of the actions taken?

This test, the most important of all the above tests, dictates that if all purchases of its own stock by a corporation taken together, accomplish the same result as the declaration of a dividend, a gain derived by a stockholder therefrom is taxable as a dividend.

In *Earle v. Woodlaw* this Court quoted the legislative history as contained in *Hyman v. Helvering*, D.C. Cir., 71 F. 2d 342, in the following language at page 344:

"Suppose . . . the case of two men holding practically the entire stock of a corporation for which each paid \$50,000.00. The corporation having accumulated a surplus of \$50,000.00 above its cash capital, buys from the stockholders for cash one-

half of the stock held by them, and cancels it, and the payment is non-taxable because it is a partial redemption of stock. To change this result and make it taxable Section 115(g) was written and incorporated into the law.”

This example is applicable to the instant case.

This Court, again in *Earle v. Woodlaw*, quotes from the case of *Smith v. United States* (3 Cir., 121 Fed. (2d) 692, 695) as follows:

“The answer within the intendment of (g) turns, not so much upon the question of whether there was or was not liquidation, as upon the result.”

In the instant case the Tax Court and the Respondent are more concerned with the question of whether there was a liquidation rather than with the net effect, or the result, of the transactions.

Petitioner acknowledges that *all* of the factors mentioned in its Brief and above have some degree of relevance. However, it also asserts that certain of the factors should be weighed more heavily in determining the net effect of the transactions than others. Certainly the fact that other Courts have consistently considered some factors of more significance than others should be of importance. And even though it is undoubtedly true that cases cited as precedent can be distinguished on their facts (it is hard to imagine two perfectly similar cases in such a complex field), these precedent cases are valuable as an aid in determining the applicable law. These cases set up the “judicial

criteria" that Judge Vinson referred to. Without these criteria an appellant would find it impossible to show error in appealing a decision of the Tax Court in which the Tax Court has stated that it has considered all the factors, when in fact it has considered only a few and has passed over lightly those usually considered of major importance. Petitioner contends that it is reasonable to assign to certain of the factors considered above more weight than to others in light of the relatively long and thorough judicial history on this question. Surely the guideposts set down by other courts as to what is important in determining what is a dividend can reasonably be given some weight and can be turned to by the Appellate Court to aid in determining if, in light of the evidence, the Tax Court is clearly erroneous, whether as a matter of law or fact.

Finally, a contention that Respondent makes in its Brief at pages 13-14 implies that the use of Section 115(g) is limited to those cases wherein the government is attempting to tax a partial liquidation as a dividend and is not available to a taxpayer for the purpose of tax reduction. Such a limitation does not exist and should not exist. The application of Section 115(g), as all parties have admitted, turns on the facts of each case. The inquiry should be simply whether there was a taxable dividend or not, as judged by reasonable criteria. Certainly the inquiry should not be into the fact of whether the taxpayer will avoid taxes or not.

In *Fostoria Glass Co. v. Yoke* (D.C.W.V. 1942), 45 F. Supp. 962, the distribution in question was made to

a corporate shareholder and the Court found the distribution to be "essentially equivalent to a dividend" within Section 115(g). The application of Section 115(g) resulted in a substantial reduction in the tax payable due to the applications of the dividends-received credit, to which the taxpayer as a corporation was entitled in view of the distributions having been the equivalent of a dividend.

In *Commissioner v. Forhan Realty Corporation* (C.C.A. 2d 1935), 75 F. 2d 268, the taxpayer, a corporation, surrendered its stock in another corporation, receiving cash and other securities therefor. The taxpayer, being a corporation, was not then taxable on dividends received. The Court of Appeals for the Second Circuit held nevertheless that the distribution should be treated as a dividend, even though the result was that no tax was paid. The Court said in 75 F. 2d, at page 269:

"Where the section refers to a distribution which 'has the effect of the distribution of a taxable dividend,' 'taxable dividend' is to be considered from the viewpoint of the corporation making the distribution, and, where the distribution has the effect of what is ordinarily considered a taxable dividend, from the distributing corporation's viewpoint, section 112(c) (2) is applicable to the entire distribution, without regard to whether there is a possibility of parts of the distribution going to some distributees which parts, if viewed as ordinary dividends, would be non-taxable to such distributees either because the distributees are corporations or because they have not sufficient income to be subject to surtax."

CONCLUSION.

Under the circumstances outlined above, it is Petitioner's view that this reviewing Court should be left with a definite and firm conviction that a mistake has been made in the decision of the Trial Court. It is submitted that the ultimate conclusion of the Tax Court was clearly erroneous and should be reversed.

Dated, San Francisco, California,

April 30, 1957.

Respectfully submitted,

DUDLEY F. MILLER,

Counsel for Petitioner.

No. 15274

United States
Court of Appeals
for the Ninth Circuit

CITY NATIONAL BANK, Appellant,

vs.

JOE BLACKARD, doing business as New and
Used Car Motor Repair Shop, Appellee.

Transcript of Record

Appeal from the District Court for the
District of Alaska,
Third Division

FILED

DEC - 3 1956

PAUL P. O'BRIEN, Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MOODY AND TALBOT,

341 F. Street,
Anchorage, Alaska,

Attorneys for Appellant,

HARTLIEB, GROH AND RADER,

Box 2068,
Anchorage, Alaska,

Attorneys for Appellee.

In the District Court for the Territory of Alaska
Third Division at Anchorage

No. A-10,845

JOE BLACKARD, dba New and Used Car Motor
Repair Shop, Plaintiff,

vs.

CITY NATIONAL BANK, Defendant.

COMPLAINT

I.

During the inclusive periods shown in Column I, one Ralph Capehart, doing business as Anchorage Freight Lines, delivered to the plaintiff the below described vehicles and requested plaintiff to repair the same. Plaintiff claims a lien upon the said vehicles for labor performed and materials furnished, in the amounts shown in Column II.

	Column I	Column II
(a) One 1942 GMC Truck	Oct. 8, 1954	\$ 752.00
Serial #7221353	to	
Motor #4263560	Dec. 18, 1954	
(b) One 1951 GMC Truck	Sept. 11, 1954	906.00
No. C 1089	to	
	Dec. 20, 1954	
(c) One 1952 Federal	April 10, 1954	1,165.00
Truck	to	
Serial #T 64277588	Dec. 20, 1954	

II.

The said Ralph Capehart was the owner and law-

ful possessor of the aforementioned vehicles and the plaintiff performed labor and furnished materials on the inclusive dates indicated in Column I above at his request.

III.

Ralph Capehart, doing business as Anchorage Freight Lines, named in this complaint, is not made a party to this action, because he is not within the jurisdiction of this Court.

IV.

Plaintiff has demanded from the said Ralph Capehart his just and reasonable charges but the said Ralph Capehart has failed to pay the same or any part thereof.

V.

Plaintiff has a right to possession of said vehicles as provided in Section 26-3-1, ACLA 1949, and a lien as provided in said section. Plaintiff is holding possession of said vehicles for the purpose of maintaining the aforesaid lien, until payment is received.

VI.

Defendant claims some interest in said vehicles by virtue of a chattel mortgage of an unknown date and amount. Defendant has attempted to summarily foreclose said chattel mortgage. Defendant's claim is subject to the lien of plaintiff.

Wherefore, plaintiff demands judgment against defendant as follows:

1. That it be decreed that plaintiff has a lien on

the aforesaid vehicles for the respective amounts shown, which is in the total amount of Two Thousand Eight Hundred and Twenty-Three Dollars (\$2,823.00).

2. That the lien of plaintiff be adjudged prior to the claim or claims of the defendant.

3. That the said vehicles be sold according to law and that the proceeds of said sale be applied to satisfy plaintiff's lien, together with the expenses of sale, and costs of this action.

/s/ JOE BLACKARD,
Plaintiff

/s/ CLIFFORD J. GROH,
Attorney for Plaintiff

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

APPEARANCE

City National Bank, defendant in the above entitled action, by its attorneys, Moody and Talbot, enters its appearance in said action and submits itself to the jurisdiction of the above entitled court. Said defendant admits service of the complaint on April 15, 1955.

/s/ RALPH MOODY,
Attorneys for Defendant

Received copy. C. J. Groh.

[Endorsed]: Filed April 28, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now defendant and for answer to plaintiff's complaint, herein admits, denies and alleges as follows:

I.

Defendant not having sufficient information or belief upon which to base an opinion as to the truth or falsity of the allegations contained in Paragraphs I., III., and IV. of plaintiff's complaint, denies each and every allegation therein contained and demands proof thereof.

II.

Defendant in answer to Paragraph II of plaintiff's complaint admits that Ralph Capehart was the owner and lawful possessor of the vehicles mentioned in plaintiff's complaint but denies each and every other allegation therein contained and demands strict proof thereof.

III.

Defendant denies each and every allegation contained in Paragraph V of plaintiff's complaint and in connection with such denial alleges the fact to be that the plaintiff is unlawfully holding possession of said vehicles which have been sold by virtue of a summary foreclosure of chattel mortgage conducted by the U. S. Marshal on the 28th day of March, 1955, at which sale the defendant herein purchased the said vehicles, the subject of this action for the

sum of \$500.00, which bid was the highest and best bid received at said sale conducted by said marshal.

IV.

Defendant admits its claims and interests in said vehicles by virtue of said sale of said vehicles by the U. S. Marshal as alleged in the preceding paragraph of this Answer, and in connection with such admission, alleges the fact to be that defendant Ralph Capehart d/b/a Anchorage Freight Lines executed a chattel mortgage to the City National Bank of Anchorage, plaintiff, on the first day of October, 1953, covering certain vehicles as named in said mortgage and including the three vehicles the subject of this suit as more fully appears from a copy of said chattel mortgage which is attached hereto as Exhibit A and made a part hereof as if fully set forth herein. Defendant further alleges that in accordance with the terms of said chattel mortgage that Ralph Capehart mortgagor therein failed to pay money for which the mortgage was given to secure payment thereof in the sum of \$6,730.00 and by virtue thereof defendant herein caused the power of sale granted to the defendant therein by the said Ralph Capehart to be exercised by the U. S. Marshal and sold as a summary foreclosure of said mortgage in accordance with law on the 28th day of March, 1955, at which time the City National Bank of Anchorage, being the only bidder at said sale, bid in three vehicles, the subject of this suit, for the sum of \$500.00 and received a marshal's bill of sale therefor, a copy of which bill of

sale is attached hereto as Exhibit B and made a part hereof as if fully set forth herein.

Defendant further alleges that its chattel mortgage as aforesaid is a superior lien to that of the plaintiff if the plaintiff has such a lien.

Wherefore City National Bank of Anchorage prays judgment as follows:

That the mortgage of the City National Bank of Anchorage executed on the 1st day of October, 1953, and the subsequent sale thereunder made by the U. S. Marshal be declared to be superior and prior to any interests which the plaintiff may have herein; that the City National Bank of Anchorage be awarded reasonable attorney's fees for defending this action, together with its costs incurred in same.

MOODY & TALBOT,
/s/ By RALPH E. MOODY,
Attorneys for Defendant

Receipt of Copy Acknowledged.

EXHIBIT A
Chattel Mortgage

This Chattel Mortgage, made and entered into this 1st day of October A. D., 1953, by and between Ralph Capehart d/b/a Anchorage Freight Lines, of Anchorage, Alaska, Third Judicial Division, Territory of Alaska, the party of the first part hereinafter called the Mortgagor, and the City Bank of Anchorage, a corporation organized and existing

under and by virtue of the laws of the Territory of Alaska, of Anchorage, Alaska, the party of the second part, hereinafter called the mortgagee, Witnesseth:

That said mortgagor does hereby mortgage to the mortgagee all that certain personal property now at Anchorage, in Anchorage Precinct, Third Judicial Division, Territory of Alaska, and more particularly described as follows, to-wit:

One used 1952 Federal 3½ Ton Tractor Truck, motor number T6427-7588m, Serial number, 156,359; One used 1942 GMC 5 ton Tractor Truck, motor number 4263560, Serial number AC 722-1353; One used 1951 GMC 1½ Ton Tractor Truck, Motor Number A248 124619; Serial number C1089, One only Flat Bed Trailer, Serial number 3185 as security for payment to the said mortgagee of the sum of Six Thousand Seven Hundred Thirty & no/100 (\$6,730.00) Dollars, lawful money of the United States of America, with interest thereon at the rate of eight (8) per cent per annum, payable in monthly installments the last of such installments being due on the 1st day of April, 1954, all according to the tenor and effect of that certain promissory note dated October 1st, 1953, given by said mortgagor to and in favor of said mortgagee.

Said mortgagor promises to pay the said sum of Six Thousand Seven Hundred Thirty & no/100 (\$6,730.00), with interest thereon, at the time and in the manner specified in said promissory note; and the mortgagor expressly agrees with the mort-

gagee that he will, during the continuance hereof, keep the mortgaged property in good condition and repair, and that he will not remove, nor permit to be removed, any part of said property from Anchorage, Alaska, and vicinity without the written consent of the mortgagee being first obtained; that he will not sell or attempt to sell or otherwise dispose of the personal property above described without the consent of the mortgagee being first obtained, unless the balance due under this mortgage shall be paid to the mortgagee as a part of the sale or other transaction; that he will not suffer nor permit any attachment, lien, or encumbrance to be placed against the above described property so as to jeopardize the security of the mortgagee therein; that he will well and truly pay, as the same becomes due, any and all taxes, levied against any of the property covered by this mortgage, whether City, Territorial or Federal, or otherwise, and that he will cause to be executed against loss upon such personal property in an amount at all times at least equal to the amount owed to the mortgagee under the said note and this mortgage, and that he will keep such insurance in full force and effect during the time when any balance due under the terms and conditions of this note and of this mortgage shall be unpaid; that he will cause such insurance to include a loss payable clause providing that in the event of a loss thereunder that the proceeds of such policy shall be paid to the mortgagee and to the mortgagor, as their respective interests may appear.

In the event that the mortgagor shall fail or re-

fuse to pay any taxes or assessments as above mentioned or to keep the property insured as herein provided, or should he suffer or permit any attachments, liens, encumbrances, or charges in violation of the terms of this mortgage, the mortgagee shall be entitled to pay such charges, liens, encumbrances, taxes, attachments, or insurance, and add any sums so paid to the principal sum secured hereby, to be paid and to draw interest as provided in such promissory note, or it may, at its election, treat such non-payment or breach as a default under the terms of this mortgage and may move to foreclose this mortgage as hereinafter provided.

And said mortgagor, hereby declares and warrants to the mortgagee that he is the absolute owner, and in possession of said mortgaged property, and that the same is free and clear of all liens, encumbrances and adverse claims.

It is hereby agreed that if said mortgagor shall fail to make payments of any installment of principal and interest as provided in said promissory note at the time and in the manner therein specified, or if any breach be made of any obligation or promise of the mortgagor, herein contained or here secured, then the whole principal sum unpaid on said promissory note, with interest thereon, shall immediately become due and payable, at the option of the mortgagee; and it may at once proceed to foreclose this mortgage according to law; or it may, at its option, and it is empowered so to do, enter upon the premise where said mortgaged property

may be, and take possession thereof, and advertise and sell the same as provided by Section 22-6-10, Compiled Laws of Alaska, 1949, and the mortgagor, hereby expressly authorized the Marshal to execute the power of sale herein granted to the mortgagee as provided in said Section 22-6-10. On any sale of the herein mortgaged property under the terms of this mortgage, the mortgagee or its representatives or assigns, may in good faith, purchase the property so sold or any part thereof. From the proceeds of any sale made of the said mortgaged property hereunder, the mortgagee may retain all costs and charges incurred by it in the taking or sale of said property.

If suit be brought to foreclose this mortgage, there shall be due from the mortgagor, to the mortgagee, its successors and assigns, a reasonable attorneys fee for the maintenance of said action, which sum is hereby secured.

It is expressly understood and agreed by the parties hereto that the said mortgagor may and shall remain in possession of the property herein mortgaged until the mortgagee shall retake the same or foreclose this mortgage, at its election, upon default by the mortgagor of the terms herein contained.

It is mutually covenanted and agreed that the provisions of this mortgage shall apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

In Witness Whereof, the said mortgagor, has

hereunto set his hand and seal on the day and year hereinabove first written.

/s/ RALPH CAPEHART,

Mortgagor

Executed in the presence of:

/s/ ARLEYNE SWITZER

/s/ R. A. KENNARD

United States of America,
Territory of Alaska—ss.

This Is To Certify that on this 1st day of October, 1953, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally appeared Ralph Capehart d/b/a Anchorage Freight Lines, known to me and to me known to be the individual named in and who executed the foregoing instrument and acknowledged to me that he signed and sealed the same as his voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first above written.

/s/ RUTH MARLAR,

Notary Public in and for the Territory of Alaska:
My Commission expires 12-11-55.

Acknowledgment of Good Faith

United States of America,
Territory of Alaska—ss.

Ralph Capehart d/b/a Anchorage Freight Lines,
the mortgagor, named in the foregoing mortgage,

and R. A. Kennard, being duly authorized to make this acknowledgment of good faith as Vice President of the City Bank of Anchorage, a corporation, and the mortgagee named in the foregoing mortgage, being first duly sworn, each for himself and not one for the other, say: That the aforesaid mortgage is made in good faith, to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

/s/ RALPH CAPEHART

CITY BANK OF ANCHOR-
AGE,

/s/ By R. A. KENNARD,
Vice President

Subscribed and sworn to before me this 1st day of October, 1953.

RUTH MARLAR,
Notary Public in and for Alaska; My Commission
Expires 12-11-55.

EXHIBIT B

Marshal's Bill of Sale

This Bill of Sale, made this 28th day of March, 1955, by me, Fred S. Williamson, United States Marshal, Third Judicial Division, Territory of Alaska

Witnesseth: That pursuant to Section 22-6-10, Alaska Compiled Laws Annotated, 1949, I the said Fred S. Williamson, United States Marshal, Third Judicial Division, Territory of Alaska, have sold to

City National Bank of Anchorage, Anchorage, Alaska, all the right, title and interest of Ralph Capehart d/b/a Anchorage Freight Lines, in and to the following described personal property, to-wit:

One (1) used 1952 Federal 3½ ton tractor truck, Motor No. T6427-7588, Serial No. 156359;

One (1) used 1942 GMC 5 Ton Tractor Truck, Motor No. 4263560, Serial No. Ac722-1353;

One (1) used 1951 GMC 1½ ton Tractor Truck, Motor No. A248 124619, Serial No. C1089.

Now Therefore, I, the said Fred S. Williamson, United States Marshal, Third Division, Territory of Alaska, do grant unto the said City National Bank of Anchorage, all the right and title of Ralph Capehart, d/b/a Anchorage Freight Lines in and to the hereinabove described property.

In Witness Whereof, I have hereunto set my hand and seal the day and year first hereinabove written.

[Seal]

FRED S. WILLIAMSON,

United States Marshal,

/s/ By DAVID A. DREW,

Deputy United States Marshal

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 28th day of March, 1955, before me the undersigned, a Notary Public in and for Alaska, duly commissioned and sworn as such, personally came David A. Drew, known to me and known to be the particular individual described in and who executed the foregoing instrument and

he acknowledged that he signed and sealed the same freely and voluntarily for the uses and purposes therein stated.

Witness my hand and notarial seal the day and year last above written.

[Seal] /s/ By AGNES H. HEALY,
Notary Public in and for Alaska. My commission
expires: 10-5-57.

[Endorsed]: Filed May 4, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant above named in the above entitled action and moves the Court to enter judgment herein for the defendant against plaintiff, Joe Blackard, d/b/a New and Used Car Motor Repair Shop, for the reason that there is no genuine issue of fact as to the priority of the City National Bank of Anchorage, defendant herein, over the claim of the plaintiff herein. This motion is based upon the records and files herein and Rule 56 of the Federal Rules of Civil Procedure.

Dated this 10th day of May, 1955.

MOODY & TALBOT,
/s/ By RALPH E. MOODY,
Attorneys for Defendant

Notice of Motion for Summary Judgment

To: Clifford Groh, Attorney for the plaintiff, Joe Blackard:

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 27th day of May, 1955, at 10:00 o'clock in the forenoon, on that day, or as soon thereafter as counsel can be heard.

MOODY & TALBOT,
/s/ By RALPH E. MOODY,
Attorneys for Defendant,

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 11, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF RALPH E. MOODY

United States of America
Territory of Alaska—ss

Ralph E. Moody, being first duly sworn on his oath, deposes and says:

That he is attorney for the defendant, City National Bank of Anchorage, herein, and makes said affidavit on behalf of said defendant.

On the 1st day of October, 1953, the defendant accepted a mortgage from Ralph Capehart d/b/a Anchorage Freight Lines covering the three vehicles, the subject of this suit, which are set out in Paragraph I of the plaintiff's complaint; that

thereafter on the 1st day of October, 1953, City National Bank of Anchorage recorded said mortgage in accordance with Chapter 124 Session Laws of Alaska 1951; that thereafter on the 17th day of March, 1954, the City National Bank of Anchorage was issued by the Territory of Alaska, certain certificates of title showing the City National Bank of Anchorage as lien holders of said vehicles, copies of which certificates of title are attached hereto and marked Exhibits A, B, and C, respectively, as pertains to the above described vehicles in Paragraph I of plaintiff's complaint; thereafter the City National Bank of Anchorage exercised its power of sale in accordance with said chattel mortgage and directed the U. S. Marshal at Anchorage, Alaska, to sell the same in accordance with Law; that thereafter on the 28th day of March, 1955, at 10:00 a.m., the U. S. Marshal at Anchorage, Alaska, sold the three vehicles, the subject of this suit, to the City National Bank for the sum of Five Hundred Dollars (\$500.00), as more fully appears from the pleading on file in this action.

/s/ RALPH E. MOODY.

Subscribed and sworn to before me this 11th day of May, 1955.

[Seal] /s/ VIRGINIA M. OGDEN,
Notary Public in and for Alaska. My Commission
expires December 20, 1958.

EXHIBIT A

Alaska Certificate of Title

Ralph Capehart, d/b/a Anchorage Freight Lines
126 N. 3rd St., Anchorage, Alaska

Title No.—D 101780

Year and Make—1942 GMC Truck Tractor

Motor No.—

Serial No.—AC 722 1353

Unladen Weight—10,800

Used—X

Date Issued—3/17/54

Lien File No.—29507

Date of Lien—10/1/53

Nature of Lien—CM

Amount—6730.00

First Lien Holder—City National Bank of Anchorage, 5th and E, Anchorage, Alaska.

/s/ K. F. DEWEY

EXHIBIT B

Alaska Certificate of Title

Ralph Capehart, d/b/a Anchorage Freight Lines
126 N. 3rd St., Anchorage, Alaska

Title No.—D 102968

Year and Make—1951 GMC

Type—Trctr Trk

Serial No.—C1089

Unladen Weight—7300

Used—X

Date Issued—3/23/54

Lien File No.—29507

Date of Lien—10/1/53

Nature of Lien—CM

Amount—6730.00

First Lien Holder—City National Bank, 5th & E, Anchorage, Alaska.

/s/ K. F. DEWEY

EXHIBIT C

Alaska Certificate of Title

Ralph Capehart, d/b/a Anchorage Freight Lines
126 N. 3rd St., Anchorage, Alaska

Title No.—D 101781

Year and Make—1952 Federal Type 3½ T. Truck

Serial No.—156 359

Unladen Weight—8555

Used—X

Date Issued—11/12/54

Lien File No.—29507

Date of Lien—10/1/53

Nature of Lien—CM

Amount—\$6730.00

First Lien Holder—City National Bank, Box 1286,
Anchorage, Alaska

/s/ K. F. DEWEY

[Endorsed]: Filed May 11, 1955.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO SUMMARY
JUDGMENT

United States of America

Territory of Alaska—ss.

Clifford J. Groh, being duly sworn, deposes and
says:

1. He is attorney for the plaintiff, Joe Blackard, doing business as New and Used Car Motor Repair Shop, and has personal knowledge of the facts herein;

2. On the inclusive dates shown in the complaint plaintiff performed labor and furnished materials on certain vehicles of one Ralph Capehart.

3. The plaintiff, on February 17, 1955, which is within ninety days after the labor was last performed, filed a lien in the office of the U. S. Commissioner and ex-Officio Recorder, a copy of which lien is hereto annexed as "Exhibit A."

4. Plaintiff has never relinquished possession of the trucks named in the complaint and still retains possession thereof and intends to retain possession thereof until payment is received. On March 10, 1955, plaintiff posted a Notice of Sale of the three trucks mentioned in the complaint which notices were posted in accordance with Alaska Statutes, Section 26-3-1.

5. The aforesaid Notices of Sale stated that unless the just and reasonable charges of the plaintiff were paid by March 28, 1955, at 9:00 a.m. the trucks would be sold to the highest bidder.

6. On March 28, 1955, at 9:00 a.m. a sale was held by the plaintiff and the trucks were sold to him for his charges.

7. The defendant, through the United States Marshal, endeavored to have a sale on March 28, 1955, at 10:00 a.m., which sale was purportedly held.

8. On April 15, 1955, plaintiff commenced this suit to foreclose his lien.

9. Plaintiff has never relinquished possession of the aforesaid vehicles.

10. The chattel mortgage of the defendant expired by its terms April 1, 1954. The defendant

permitted one Ralph Capehart to stay in possession of the aforesaid vehicles.

/s/ CLIFFORD J. GROH,
Attorney for Plaintiff.

Subscribed and sworn to before me this 16th day of June, 1955.

[Seal] /s/ GORDON W. HARTLIEB,
Notary Public in and for Alaska. My Commission
Expires May 18, 1959.

EXHIBIT A

Notice of Lien Upon Chattels for Labor and Material Expended

Joe Blackard d/b/a New and Used Car Motors Repairs Shop, vs. Ralph Capehard d/b/a Anchorage Freight Lines.

Notice is hereby given that Joe Blackard d/b/a New and Used Car Motor Repairs Shop claims liens on the following described motor vehicles:

1950 Diamond T Truck—Serial No. #910 NO 191

1952 Federal—Serial No. T64277588

1942 GMC—No. 7221353-4263560

1951 GMC—No. C1089

for, and account of labor, skill and materials expended upon said vehicle; that the name of the owner, or reputed owner, is Ralph Capehart d/b/a Anchorage Freight Lines; that the said labor, skill and materials were expended by the claimant so named above between the dates shown opposite the respective vehicles below:

1950 Diamond T Truck—Serial No. #910 NO 191—December 1 and December 16, 1954 inclusive

1952 Federal—Serial No. T4277588—April 10,
1954 and Dec. 20, 1954

1942 GMC—No. 7221353-4263560 — October 8,
1954

1951 GMC—No. C1089—September 11, 1954 and
December 20, 1954

and the rendition of the labor, skill and materials
so expended by the claimant above named was
closed on the last date shown opposite the indi-
vidual vehicles listed above; that the amount claim-
ant demands for said labor, skill and materials so
expended is \$3866.50; that no part thereof has been
paid, and that there is now due and remaining un-
paid thereon, after deducting all just credits and
offsets, the sum of \$3866.50, in which amount he
claims a lien upon said property. Claimant has pos-
session of the vehicles.

/s/ JOE BLACKARD.

United States of America

Territory of Alaska—ss.

I, Joe Blackard, being first duly sworn, on oath
say that I am the claimant named in the foregoing
claim; that I have read the same, and know the
contents thereof, and believe the same to be true.

/s/ JOE BLACKARD.

Subscribed and sworn to before me this 17th day
of February, 1955.

/s/NORA BOSWELL,

Notary Public for Territory of Alaska. My Com-
mission Expires January 26, 1956.

[Endorsed]: Filed June 17, 1955.

[Title of District Court and Cause.]

STIPULATION

Whereas Joe Blackard d/b/a New and Used Car Motor Repair Shop, plaintiff herein, has instituted suit against the City National Bank of Anchorage, defendant herein, claiming a lien on certain vehicles for labor performed and materials furnished in an amount shown in the plaintiff's complaint on file herein; and

Whereas, defendant prior to the filing of the above entitled cause on the 28th day of March, 1955, purchased said vehicles at a Marshal's Sale by virtue of a chattel mortgage foreclosure; and

Whereas, the rights and interests of the respective parties, plaintiff and defendant herein, are now at litigation in this cause; and

Whereas, it is the desire of the plaintiff and defendant to sell the three vehicles listed in said complaint as expeditiously as possible for their reasonable value in order to keep the vehicles from depreciating in value;

Now therefore, for and in consideration of the following agreements to be kept and performed by the respective parties hereto, it is mutually agreed:

1. That City National Bank of Anchorage shall have the right to sell each of the vehicles listed in Paragraph I of plaintiff's complaint in this action for and at the highest price that can be obtained, and that upon the sale of said vehicles by the City National Bank of Anchorage, the plaintiff who now has possession of the same will release the same to

the buyer upon receiving written statements from the City National Bank of Anchorage that the purchase price agreed upon between the bank and the buyer or buyers has been paid to the bank.

2. Plaintiff agrees to deliver said vehicles to the buyer or buyers without any charge whatsoever other than the purchase price paid by the buyer or buyers to the City National Bank of Anchorage.

3. Plaintiff agrees that the vehicles at the time this stipulation was entered into have all their component parts and further agrees that he will not remove any parts from said vehicles or substitute or interchange any parts of the vehicles.

4. Plaintiff further agrees that the vehicles until sold by the Bank and delivered to the buyer or buyers shall be kept and maintained at the expense of the plaintiff, and that he will not allow the same to be pilfered or in any manner damaged.

5. Defendant agrees that all moneys received from the buyer or buyers in connection with the sale of the vehicles will be placed in escrow at the City National Bank of Anchorage for the benefit of the parties to this suit to be paid to the party prevailing in this action upon the final determination of the Court, provided, however, that should the City National Bank of Anchorage prevail in this action and be determined to be the rightful owners of the vehicles, then and in that event, the City National Bank of Anchorage agrees to pay to the plaintiff the following:

\$90.00 for storage of the 1942 GMC Truck

90.00 " " " " 1951 GMC Truck

135.00 for storage of the 1952 Federal Truck upon the final determination of said case by the Court in the Bank's favor.

In the event that the plaintiff shall prevail in this action, then and in that event only, all moneys received from the buyer or buyers for the sale of said vehicles by the bank and placed in escrow shall be distributed as follows:

First, to the payment of the sum set forth in plaintiff's complaint; and

Second, the balance, if any, shall be turned over to the City National Bank of Anchorage as the sole property of said bank, in which event the Bank shall not be liable to plaintiff for any storage charges whatsoever for any of the vehicles.

6. It is specifically understood and agreed that the agreement to pay storage as hereinbefore set forth by the City National Bank of Anchorage in the event it shall prevail in this suit shall constitute a total amount that the bank shall be liable to plaintiff for storage and/or care of said vehicles regardless of how long the same shall be in the possession of and stored by plaintiff.

7. The City National Bank of Anchorage in connection with the sale of any or all vehicles agreed to be sold, agrees to consult with the plaintiff relative to the Sale Price prior to completing the sale, and in that event, if in the opinion of the plaintiff that the price which the bank proposes to sell the said vehicles is not a fair price, then and in that event, the sale shall not be completed

for a period of 24 hours from the time the plaintiff is notified in order that the plaintiff may attempt to obtain a buyer at a higher figure; however, in the event that the plaintiff does not obtain a better offer within 24 hours after he has been notified of the proposed price by the buyer or buyers, then and in that event, the Bank shall have the right to sell the vehicles in question for the price offered by the respective buyer or buyers.

8. With reference to Paragraph 4 wherein plaintiff agrees to keep and maintain the vehicles and not allow them to be pilfered or damaged in any manner, it is mutually agreed that the plaintiff in order to protect himself against such pilfering and damages, is authorized to obtain the necessary insurance to protect himself against such hazards and that in the event that the plaintiff shall prevail in the action now pending, the costs of obtaining the insurance shall be borne by the plaintiff; however, in the event that the bank shall prevail in this action, then and in that event, the Bank shall reimburse the plaintiff for the necessary costs of obtaining insurance to protect against hazards enumerated in Paragraph 4, upon the plaintiff delivering to the Bank the policies of insurance issued to cover such hazards.

9. It is understood and agreed that the City National Bank of Anchorage has in its possession the Marshal's Bills of Sale covering the three vehicles in question and listed on the plaintiff's complaint and that it will deliver the necessary Bills of Sale on the vehicles sold to the buyer or buyers in ac-

cordance with this stipulation, that the plaintiff shall thereafter have no right, title or interest in the vehicles but his rights shall be subrogated to the money received for said vehicles which is to be retained in escrow as set forth above.

10. This stipulation is executed for and on behalf of the plaintiff, Joe Blackard by his attorney, Clifford J. Groh, and for and on behalf of the defendant, City National Bank of Anchorage, by its attorney, Ralph E. Moody, and the same shall be binding upon the plaintiff and defendant alike as though the same were executed in person by the plaintiff and defendant's authorized officers.

Dated at Anchorage, Alaska, this 29th day of June, 1955.

JOE BLACKARD, d/b/a NEW AND
USED CAR MOTOR REPAIR
SHOP,

/s/ By CLIFFORD J. GROH,

His Attorney.

CITY NATIONAL BANK OF
ANCHORAGE,

/s/ By RALPH E. MOODY,

Its Attorney.

[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on a Motion for Summary Judgment, and

Hartlieb, Groh and Rader, through Clifford J. Groh, appeared for plaintiff, and Moody and Talbot, appeared for the defendant, City National Bank, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

Findings of Fact

I.

During the inclusive periods shown in Column I, one Ralph Capehart, doing business as Anchorage Freight Lines, delivered to the plaintiff the below described vehicles and requested plaintiff to repair the same. Plaintiff claims a lien upon the said vehicles for labor performed and materials furnished, in the amounts shown in Column II.

	Column I	Column II
(a). One 1942 GMC Truck Serial #7221353 Motor #4263560	Oct. 8, 1954 to Dec. 18, 1954	\$752.00
(b). One 1951 GMC Truck No. C 1089	Sept. 11, 1954 to Dec. 20, 1954	\$906.00
(c) One 1952 Federal Truck, Serial #64277588	April 10, 1954 to Dec. 20, 1954	\$1,165.00

II.

The said Ralph Capehart was the owner and lawful possessor of the aforementioned vehicles and the plaintiff performed labor and furnished materials on the inclusive dates indicated in Column I above at his request.

III.

Ralph Capehart, doing business as Anchorage Freight Lines, named in this complaint, is not made

a party to this action, because he is not within the jurisdiction of this Court.

IV.

Plaintiff has demanded from the said Ralph Capehart his just and reasonable charges, but the said Ralph Capehart has failed to pay the same or any part thereof.

V.

Plaintiff has a right to possession of said vehicles as provided in Section 26-3-1, ACLA 1949, and a lien as provided in said section. Plaintiff is holding possession of said vehicles for the purpose of maintaining the aforesaid lien, until payment is received.

VI.

Defendant claims some interest in said vehicles by virtue of a chattel mortgage dated October 1, 1953. Defendant's claim is subject to the lien of plaintiff.

VII.

Plaintiff, in accordance with Section 26-3-1, ACLA, 1949, scheduled a sale of said vehicles to satisfy his lien for 9:00 a.m., March 28, 1955.

VIII.

Defendant scheduled a Marshal's Sale under the summary foreclosure provisions of his chattel mortgage for 10:00 a.m., March 28, 1955.

IX.

Plaintiff has not delivered the vehicles to the

U. S. Marshal, but has retained possession of the same.

Conclusions of Law

From the foregoing facts, the Court concludes:

I.

Plaintiff is entitled to judgment against Ralph Capehart in the amount of Two Thousand Eight Hundred and Twenty-Three Dollars (\$2,823.00), together with interest thereon at the rate of six per cent (6%) per annum from the date judgment is entered, together with costs of suit incurred herein, and a reasonable attorney's fee.

II.

Plaintiff has a lien on the hereinafter described personal property for all of said sum:

(1) 1942 GMC Truck, Serial No. 7221353, Motor No. 4263560

(1) 1951 GMC Truck, No. C 1089

(1) 1952 Federal Truck, Serial # T 64277588

III.

The lien of plaintiff is prior to and superior to that of Defendant City National Bank.

IV.

Let judgment be entered accordingly.

Dated this 16th day of June, 1956.

/s/ J. L. McCARREY, JR.

District Judge.

[Endorsed]: Filed June 16, 1956.

In the United States District Court for the District
of Alaska, Third Judicial Division
No. A-10,845

JOE BLACKARD, d/b/a NEW AND USED
CAR MOTOR REPAIR SHOP,
Plaintiff,

vs.

CITY NATIONAL BANK, Defendant.

JUDGMENT

The above-entitled cause came on regularly for hearing on a Motion for Summary Judgment, and Hartlieb, Groh and Rader, through Clifford J. Groh, appeared for plaintiff, and Moody and Talbot, appeared for the defendant, City National Bank, and the Court having duly considered the evidence and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith;

Now, therefore, by reason of the law and findings aforesaid;

It is hereby ordered, adjudged and decreed:

I.

That the amount due the plaintiff, Joe Blackard, from the defendant, Ralph Capehart, is the sum of Two Thousand Eight Hundred Twenty-Three and 00/100 Dollars (\$2,823.00), with interest thereon at the rate of six per cent (6%) per annum from the date of this Judgment, and the costs in the amount of Twenty-Seven and 00/100 Dollars (\$27.00), and a reasonable attorney's fee in the amount of Rule 25.

II.

Plaintiff Joe Blackard has a lien upon the hereinafter described property for all of said sum:

- (a). (1) 1952 GMC Truck, Serial #7221353, Motor #4263560
- (b). (1) 1951 GMC Truck, No. C-1089
- (c). (1) 1952 Federal Truck, Serial #T64277588

III.

That plaintiff's lien is prior to and superior to that of defendant City National Bank.

IV.

That the above described property, or so much thereof as may be necessary to sell, be sold at public auction in the manner prescribed by law, and any party to this action may be a purchaser at such sale.

V.

That the proceeds of said sale shall be applied first, to the payment of the costs of sale; secondly, to the payment to the plaintiff and the total amount due under this Judgment; and if there be any surplus remaining, the same shall be paid to the defendant, City National Bank.

Let execution issue.

Dated this 16th day of June, 1956.

/s/ J. L. McCARREY, JR.,
District Court Judge.

Entered Journal No. G46, Page No. 282, June 16, 1956.

[Endorsed]: Filed June 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Clifford J. Groh, Hartlieb, Groh & Rader, Attorneys at Law, and Joe Blackard, Plaintiff.

Notice is hereby given that the defendant herein, City National Bank, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Summary Judgment entered herein granting the plaintiff's lien priority over the mortgage lien of the defendant, City National Bank; which judgment was filed of record on the 16th day of July, 1956.

Dated at Anchorage, Alaska, this 22nd day of June, 1956.

MOODY & TALBOT,

/s/ By RALPH E. MOODY,

Attorneys for defendant, City
National Bank,

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 25, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to (1) Rule 10(1) of the Rules of the United States Court of Appeals, Ninth Circuit, (2) Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure, and (3) the designations of counsel, I am transmitting here-

with the original papers in my office dealing with the above-entitled action.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from judgment filed and entered in the above-entitled action by the above-entitled Court on June 16, 1956.

Dated at Anchorage, Alaska, this 16th day of August, 1956.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15274. United States Court of Appeals for the Ninth Circuit. City National Bank, Appellant, vs. Joe Blackard, doing business as New and Used Car Motor Repair Shop, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: September 4, 1956.

Docketed: September 14, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth District.

In the United States Court of Appeals
for the Ninth Circuit
No. 15274

CITY NATIONAL BANK, Appellant,

vs.

JOE BLACKARD, d/b/a NEW AND USED
CAR MOTOR REPAIR SHOP,
Appellee.

STATEMENT OF POINTS

Appellant, City National Bank, submits the following statement of points on which it intends to rely on its appeal:

1. The Court erred in denying motion for summary judgment of Appellant, City National Bank as filed on May 11, 1955.

2. The Court erred in granting the Appellee, Joe Blackard, d/b/a New and Used Car Motor Repair Shop, a summary judgment in the absence of any motion on the part of the Appellee for a summary judgment.

3. The Court erred in holding that the Appellee's common law lien, based upon possession of the property described in the complaint, was superior to the prior recorded mortgage of the Appellant, City National Bank.

4. The Court erred in granting judgment to the Appellee against the defendant Ralph Capehart

since there had been no personal service or substituted service on the defendant Ralph Capehart by publication of summons or otherwise.

5. The Court erred in granting the Appellee's lien as established by Sections 26-3-1 and 26-3-5, Compiled Laws of Alaska 1949, over the lien of the Appellant City National Bank as established by Chapter 124, Session Laws of Alaska 1951.

Dated at Anchorage, Alaska this 21st day of September, 1956.

MOODY & TALBOT,
/s/ By RALPH E. MOODY,
Attorneys for Appellant, City
National Bank.

[Endorsed]: Filed September 24, 1956. Paul P. O'Brien, Clerk.



No. 15281

**United States
Court of Appeals**
for the Ninth Circuit

JOHN YANDELL,

Appellant,

vs.

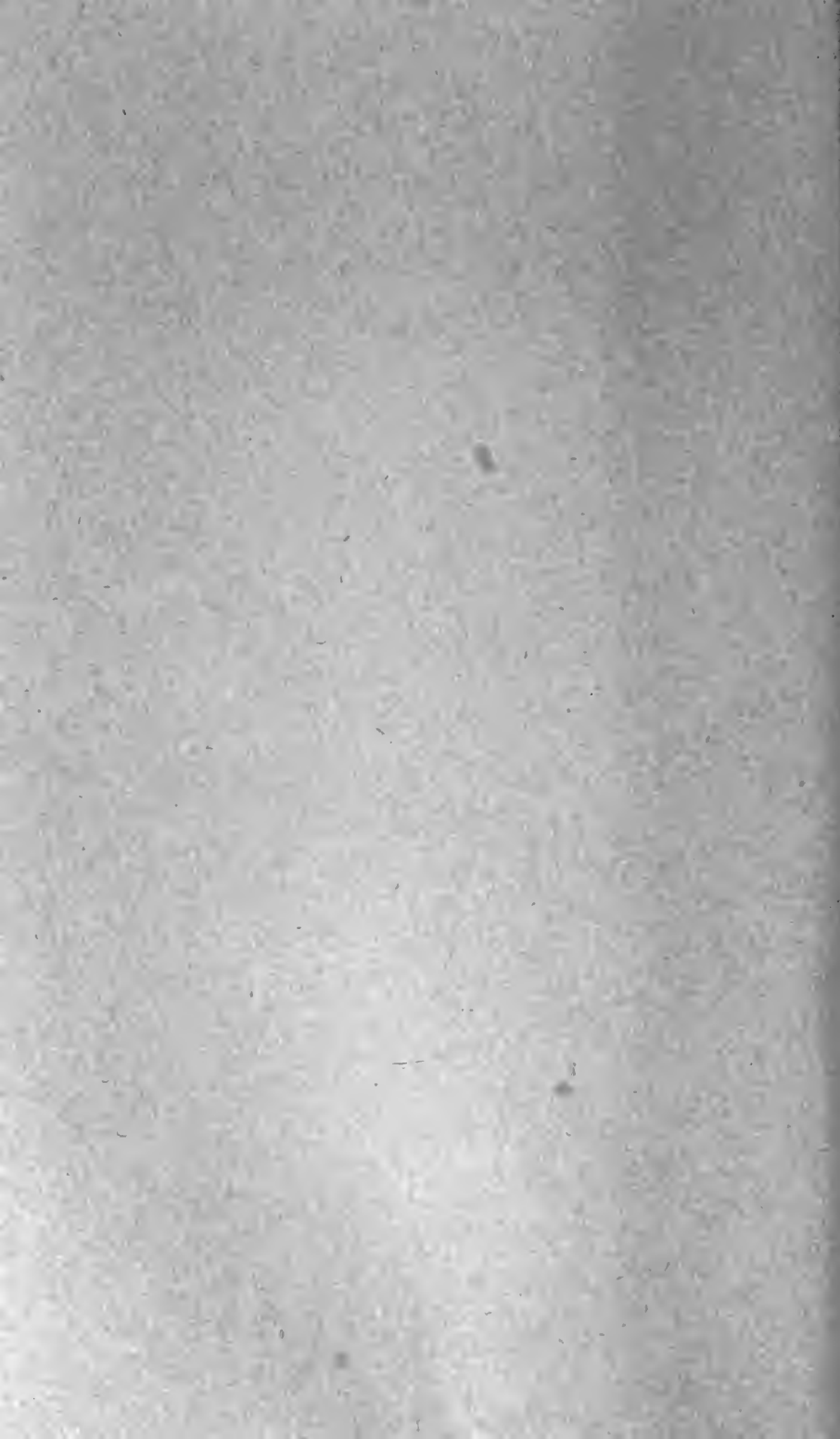
TRANSOCEAN AIR LINES, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

OCT 24 1956



No. 15281

United States
Court of Appeals
for the Ninth Circuit

JOHN YANDELL,

Appellant,

vs.

TRANSOCEAN AIR LINES, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOHN J. PURCHIO,
J. ADRIAN PALMQUIST,
505 First Western Bank Bldg.,
Oakland 12, California,
For Libelant & Appellant.

BERRY & DAVIS,
1202 Bank of America Bank Building,
Oakland 12, California,
For Respondent & Appellee.

In the District Court of the United States
Northern District of California, Southern Division

Civil No. 33055

In Admiralty No. 27203

JOHN YANDELL,

Plaintiff,

vs.

TRANSOCEAN AIR LINES, a Corporation, and
JOHN DOE SORENSON,

Defendants.

COMPLAINT FOR ASSAULT AND BATTERY

Comes now plaintiff John Yandell and complains
of defendants and for cause of action alleges:

I.

That at all times herein mentioned, defendant
Transocean Air Lines was and is a corporation duly
organized and existing by law.

II.

That at all times herein mentioned, defendant
John Doe Sorenson was and is a servant, agent and
employee of the said defendant, Transocean Air
Lines, a corporation, and was acting in the full
course and scope of his employment.

III.

That on or about the 31st day of July, 1952, de-
fendant John Doe Sorenson was employed by the

defendant Transocean Air Lines as a manager of a certain mess hall located on Wake Island, an island owned by the United States of America.

IV.

That on or about the 31st day of July, 1952, plaintiff was employed as an air lines pilot for California Eastern Airways, Inc.; that on said date, his duties as said employee had taken him to Wake Island, a possession of the United States of America, as aforesaid; that at said time and place, there was in effect an agreement between California Eastern Airways, Inc., and Transocean Air Lines whereby pilots and employees of California Eastern Airways, Inc., were billeted in Transocean Air Lines quarters and were fed in the Transocean Air Lines mess hall; that plaintiff, in accordance with said agreement, paid his bed and lodging bill in the amount of Twenty and Forty/100 Dollars (\$20.40) to Transocean Air Lines for the period of July 31 to August 1, 1952.

V.

That on or about the 31st day of July, 1952, plaintiff John Yandell entered the aforementioned mess hall, which was being managed as aforesaid by defendant John Doe Sorenson; that the plaintiff, John Yandell asked defendant John Doe Sorenson if arrangements could be made to obtain a meal for said plaintiff; that at said time and place, defendant John Doe Sorenson, while acting as manager of the aforesaid mess hall and acting in the full course and scope of his employment as an employee

of said defendant, Transocean Air Lines, approached plaintiff and, without cause or provocation, unlawfully and unjustly assaulted plaintiff by striking him many times over the head and about other portions of his body with an object, unknown to plaintiff at this time, with great force and violence.

VI.

That as a direct and proximate result of the unlawful and unjust assault on plaintiff as aforesaid, plaintiff suffered the following serious and grievous injuries, to wit:

Severe lacerations of the forehead, left ear, left mastoid area, and head; concussion with resulting injury to the brain and impairment of his eyes and left ear; multiple bruises and abrasions about the body.

That by reason of plaintiff's said injuries, proximately caused as aforesaid, plaintiff was made sick, sore, lame and disabled and plaintiff is informed and believes and, on such information and belief, alleges that his injuries are permanent in their character.

VII.

That as a direct and proximate result of the said unlawful and unjust assault on plaintiff as aforesaid, and the injuries to plaintiff proximately caused thereby, plaintiff was required to and did secure the services of duly licensed physicians and surgeons and roentgenologists in the care and treatment of his said injuries; that the cost of said

treatment and services to date is unknown to plaintiff at this time and plaintiff is informed and believes and, on such information and belief, alleges that he will be required to secure additional such services in the future care and treatment of his said injuries, proximately caused as aforesaid, and plaintiff prays leave of Court to amend his complaint to set forth the full extent of his damage in this regard when the same has been ascertained.

VIII.

That at the time of the assault hereinbefore referred to, plaintiff was an able-bodied man and employed as an air lines pilot; that as a direct and proximate result of the said assault and the injuries proximately caused thereby, plaintiff has lost time from his work and is informed and believes that he will be required to lose time from his employment in the future, and prays leave of Court to amend his complaint to set forth the full damage in this regard when the same has been ascertained.

IX.

That as a direct and proximate result of the said assault as hereinbefore set forth, and the injuries to plaintiff proximately caused thereby, plaintiff has been generally damaged in the sum of One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00).

X.

That in doing and committing the assault, defendant John Doe Sorenson acted maliciously and

was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damages against said defendants, and each of them, in the sum of One Hundred Thousand and No/100 Dollars (\$100,000.00).

Wherefore, plaintiff prays judgment against said defendants and each of them in the sum of One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00) as compensatory damages, and the sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) as exemplary and punitive damages, for his costs of suit herein incurred, and for such other and further relief as to the Court may seem just and proper.

/s/ J. ADRIAN PALMQUIST,
Attorney for Plaintiff.

[Endorsed]: Filed September 16, 1953.

[Endorsed]: Filed October 4, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR
ASSAULT AND BATTERY

Comes now defendant Transocean Air Lnes, a corporation, and answering plaintiff's complaint on file herein admits, denies, and alleges as follows:

I.

Answering paragraph I of said complaint this

answering defendant admits that it was and is a corporation duly organized and existing by law.

II.

Answering paragraph II of said complaint this answering defendant admits that Martin Sorenson (sued herein as John Doe Sorenson) was at all times herein mentioned a servant, agent and employee of defendant Transocean Air Lines, a corporation, but denies that at all times herein mentioned he was acting in the course and scope of his employment.

III.

Answering paragraph III of said complaint this answering defendant admits the allegations therein contained.

IV.

Answering paragraph IV of said complaint this answering defendant alleges that it has no information or belief as to whether plaintiff was employed as an air lines pilot for California Eastern Airways, Inc. on or about the 31st day of July, 1952, or whether his duties as said employee had taken him to Wake Island, a possession of the United States of America, and basing its answer on said ground denies said allegations;

Further answering said paragraph IV this answering defendant admits that there was in effect an agreement between California Eastern Airways, Inc. and Transocean Air Lines whereby pilots and employees of California Eastern Airways, Inc. were

billeted in Transocean Air Lines quarters and were fed in the Transocean Air Lines mess hall subject to certain reasonable and necessary rules and regulations laid down by Transocean Air Lines;

Further answering said paragraph IV this answering defendant alleges that it has no information or belief as to whether plaintiff paid his bed and lodging bill in the amount of \$20.40 to Transocean Air Lines for the period of July 31st to August 1st, 1952, and basing its answer on that ground denies said allegation.

V.

Answering paragraph V of said complaint this answering defendant alleges that on or about the 31st day of July, 1952, the plaintiff entered the private living quarters of said Martin Sorenson in said mess hall building and demanded that he and his party be served with a meal and that whatever altercation or episode occurred took place in said private living quarters of said Martin Sorenson;

Further answering said paragraph V of said complaint this answering defendant denies that at said time and place said Martin Sorenson either in his official capacity with Transocean Air Lines or on his own behalf assaulted plaintiff in any fashion, and further denies that said Martin Sorenson struck plaintiff many times over the head or about the body.

VI.

Answering paragraph VI of said complaint this answering defendant denies that plaintiff's alleged

injuries resulted from an alleged unlawful and unjust assault on plaintiff by said Martin Sorenson.

Further answering said paragraph VI this answering defendant alleges that it has no information or belief as to whether said alleged injuries made plaintiff sick, sore, lame or disabled, or that said injuries are permanent in their character, and basing its answer on that ground denies said allegation.

VII.

Answering paragraph VII of said complaint this answering defendant denies that as a direct and proximate result of an alleged unlawful and unjust assault on plaintiff, plaintiff was required to and did secure the services of duly licensed physicians and surgeons and roentgenologists in the care and treatment of his said injuries.

VIII.

Answering paragraph VIII of said complaint this answering defendant has no information or belief as to whether the plaintiff was an able-bodied man employed as an air lines pilot, or that plaintiff lost time from his work, or that he will be required to lose time from his employment in the future, and basing its answer on said ground denies said allegations.

IX.

Answering paragraph IX of said complaint this answering defendant denies that plaintiff has been generally damaged in the sum of \$150,000.00, or in

any other sum, as a result of an alleged assault and the injuries to plaintiff proximately caused thereby.

X.

Answering paragraph X of said complaint this answering defendant denies that in fact said Martin Sorenson committed an assault, or that said Martin Sorenson acted maliciously and was guilty of wanton disregard of the rights and feelings of plaintiff;

Further answering said paragraph X this answering defendant denies that plaintiff is entitled to exemplary or punitive damages in the sum of \$100,000.00 or in any sum.

As a separate defense this answering defendant alleges that at the time and place described in plaintiff's complaint and immediately prior to the time plaintiff suffered his alleged injuries and damages, if any there were, plaintiff was a trespasser in the private living quarters of said Martin Sorenson, and that at said time and place plaintiff wilfully, wrongfully and unlawfully perpetrated and committed an assault upon said Martin Sorenson and himself provoked and was the aggressor in whatever altercation or episode occurred at said time and place; that by reason of plaintiff's said assault upon said Martin Sorenson the latter was required to act in his own self defense and all force used by said Martin Sorenson toward plaintiff, if any, was justifiably employed by said Martin Sorenson in resisting plaintiff's assault and in said Martin Sorenson's self defense; that by reason of the foregoing

facts alleged in this special defense plaintiff proximately caused and contributed to all injuries and damages suffered by him at said time and place, if any there were.

As a further, separate defense this answering defendant alleges that the plaintiff has been guilty of laches and unreasonable delay in bringing this action, resulting in prejudice to the defendant, and that the cause of action resulting from the alleged assault and resulting injuries is barred by the applicable statute of limitations pertaining to such alleged acts and civil offenses occurring on Wake Island.

Wherefore, this answering defendant prays that plaintiff take nothing by reason of his complaint, and that defendant be hence dismissed with its costs of suit incurred herein.

BERRY AND DAVIS,

By /s/ WILLIAM N. CHANNELL,
Attorneys for Defendant Transocean Air Lines, a
Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed October 20, 1953.

[Endorsed]: Filed October 4, 1955.

In the United States District Court for the North-
ern District of California, Southern Division

In Admiralty 27203

JOHN YANDELL,

Plaintiff,

vs.

TRANSOCEAN AIR LINES, a Corporation, and
JOHN DOE SORENSON,

Defendants.

MEMORANDUM AND ORDER

This action was originally filed on the civil side in which plaintiff sought damages for alleged injuries resulting from an alleged assault and battery by an employee of defendant on plaintiff. It is undisputed that the occurrence out of which the action arose took place on Wake Island, an insular possession of the United States. Plaintiff had demanded a jury trial, but when the case came on for trial he waived a jury and moved that the case be transferred to the admiralty side. This motion was granted and the case was tried in admiralty before the Court. Defendant consented to the waiver of a jury, and before the trial moved for judgment on the pleadings on the ground that the action was barred by the statute of limitations. Ruling was reserved on this motion, and the case proceeded to trial.

At the conclusion of the evidence a motion to restore the case to the civil docket was made and

ruling was reserved. In view of the provisions of 48 U.S.C. 644a the question of the jurisdiction of the Court was briefed and submitted. Section 644a by its language raises serious jurisdictional questions. It reads in pertinent part as follows:

“The jurisdiction of the United States District Court for the District of Hawaii is extended to all civil and criminal cases arising on or within * * * Wake Island, * * * All civil acts and deeds consummated and taking place on any of these islands or in the waters adjacent thereto, and all offenses and crimes committed thereon, or on or in the waters adjacent thereto, shall be deemed to have been consummated or committed on the high seas on board a merchant vessel or other vessel belonging to the United States and shall be adjudicated and determined or adjudged and punished according to the laws of the United States relating to such civil acts or offenses on such ships or vessels on the high seas, which laws for the purpose aforesaid are extended over such islands, rocks, and keys. * * *” (Emphasis added.)

However, it is not necessary to decide the jurisdictional questions which may flow from this Section because the action must be dismissed whether tried in admiralty or as a civil action. The complaint states that the alleged assault took place on or about July 31, 1952, and the complaint was filed on September 16, 1953, more than one year after the claim for relief arose.

The only applicable statute of limitations is Section 340(3) of the Code of Civil Procedure of the State of California, which provides that an action for assault and battery must be commenced within one year. This statute would completely bar a common law recovery in an action at law since this Court is bound to apply the statute of the State in which the action was brought, if there is no applicable statute of the place where the alleged assault occurred. Counsel have not cited and research does not disclose any such other statute.

Plaintiff, now libellant, seeks to avoid these implications by asserting that the action, whether in admiralty or as a civil action, is triable under the general maritime law because of the language of Section 644a, and the admiralty doctrine of laches, rather than the statute of limitations is applicable. He further asserts that there has been no showing of prejudice to the defendant, or respondent, by reason of the late filing to establish the defense of laches.

These assertions overlook the principle that in actions for personal injuries admiralty will apply the common law limitations by analogy unless equitable reasons exist for not doing so. See: 2 C.J.S. 173; *Pope v. McGrady Rogers Co.*, 70 F. Supp. 780, affirmed 164 F. 2d 591; *Sloand v. U. S.*, 93 F. Supp. 83; *Le Gate v. The Panamolga*, 221 F. 2d 689. The premise of this rule seems to be that admiralty, while not bound by the common law limitations, will adopt them by analogy where it would be incon-

sistent to permit a libel in admiralty which would be barred if started as an action at common law.

The reason for the application of the rule here is more convincing because the action here could never be tried in admiralty, but for Section 644a. The alleged assault took place on land; the participants were an airline pilot and the steward of a mess hall maintained by the defendant airline; there were no vessels involved, and no possible connection with maritime commerce on the high seas; without the language of Section 644a the action would have been tried at common law, and the California statute of limitations would have barred the action. In such a situation, without a showing of some equitable reason for not adopting the common law limitation it would be inconsistent and unseemly for admiralty to permit the action to be tried. If the action is one properly triable at law it is barred by the statute of limitations; if it is properly triable in admiralty it is barred by laches. The action, therefore, must be dismissed.

It is, therefore, Ordered that the action be, and the same is hereby dismissed.

Dated: August 2, 1956.

/s/ OLIVER J. CARTER,

United States District Judge

[Endorsed]: Filed August 2, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Honorable Oliver J. Carter, Judge of the
United States District Court, for the Northern
District of California, Southern Division:

Plaintiff John Yandell hereby appeals from that
Order of the above entitled Court, and the Honorable
Oliver J. Carter, Judge thereof, made and
entered in the above-entitled matter on the 2nd day
of August, 1956, dismissing the within action.

This notice is filed for the purpose of complying
with the requirements of the provisions of Rule 73
(b), Rules on Appeal.

Dated: August 30, 1956.

/s/ JOHN J. PURCHIO and

/s/ J. ADRIAN PALMQUIST,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed August 31, 1956.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To: The Honorable United States District Court for
the Northern District of California, Southern
Division:

Plaintiff, John Yandell, in accordance with Rule
75 (a) of the Rules of Civil Procedure, hereby files
Appellant's Statement of Points and Designation
of Record in the above-entitled cause as follows:

That the Honorable Court erred in dismissing
the within action on August 2, 1956.

Appellant hereby designates the following por-
tion of the record to be contained in the Record on
Appeal:

The Complaint, the Answer, the Memorandum
and Order of the Honorable Court, dated August
2, 1956, and the Notice of Appeal.

Dated: August 30, 1956.

/s/ JOHN J. PURCHIO, and

/s/ J. ADRIAN PALMQUIST,

Attorneys for Plaintiff & Ap-
pellant.

[Endorsed]: Filed August 31, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant;

Complaint for Assault and Battery.

Answer to Complaint for Assault and Battery.

Memorandum and Order.

Notice of Appeal.

Appellant's Statement of Points and Authorities and Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of September, 1956.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15281. United States Court of Appeals for the Ninth Circuit. John Yandell, Appellant, vs. Transocean Air Lines, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 11, 1956.

Docketed September 18, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15,281

United States Court of Appeals
For the Ninth Circuit

JOHN YANDELL,

Appellant,

VS.

TRANSOCEAN AIR LINES, a Corporation,

Appellee.

BRIEF FOR APPELLANT.

J. ADRIAN PALMQUIST,

KAISER & O'NEILL,

JEREMIAH F. O'NEILL, JR.

JOHN J. PURCHIO,

505 First Western Bank Building,

Oakland 12, California,

Attorneys for Appellant.

FILED

DEC 27 1956

PAUL P. O'BRIEN, CLERK



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No. 15,281

United States Court of Appeals For the Ninth Circuit

JOHN YANDELL,

Appellant,

VS.

TRANSOCEAN AIR LINES, a Corporation,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

This is an appeal from an order of the United States District Court, for the Northern District of California, Southern Division, Honorable Oliver J. Carter presiding, dismissing the within action.

The case involves an action for assault and battery alleged to have taken place on the 31st day of July, 1952, on Wake Island, an island owned by the United States of America. (Paragraphs III, IV and V of Complaint for Assault and Battery, pages 3 to 5 of Record on Appeal.)

The basis for the jurisdiction of the United States District Court is found in 48 U.S.C.A. 644a:

“The jurisdiction of the United States District Court for the District of Hawaii is extended to all civil and criminal cases arising on or within

the Midway Islands, Wake Island, Johnston Island, Sand Island, Kingman Reef, Kure Island, Baker Island, Howland Island, Jarvis Island, and having regard to the special status of Canton and Enderbury Islands pursuant to an agreement of April 6, 1939, between the Governments of the United States and of the United Kingdom to set up a regime for their use in common, the said jurisdiction is also extended to all civil and criminal cases arising on or within Canton Island and Enderbury Island: *Provided*, That such extension to Canton and Enderbury Islands shall in no way be construed to be prejudicial to the claims of the United Kingdom to said islands in accordance with the agreement. All civil acts and deeds consummated and taking place on any of these islands or in the waters adjacent thereto, and all offenses and crimes committed thereon, or on or in the waters adjacent thereto, shall be deemed to have been consummated or committed on the high seas on board a merchant vessel or other vessel belonging to the United States and shall be adjudicated and determined or adjudged and punished according to the laws of the United States relating to such civil acts or offenses on such ships or vessels on the high seas, which laws for the purpose aforesaid are extended over such islands, rocks and keys.

“The laws of the United States relating to juries and jury trials shall be applicable to the trial of such cases before said district court.”

And in 28 U.S.C.A., Section 1333:

“The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

“(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

The basis for the jurisdiction of the United States Court of Appeals for the Ninth Circuit is found in 28 U.S.C.A. 1291:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”

STATEMENT OF THE CASE.

On July 31, 1952, on Wake Island, an island owned by the United States, appellant and an employee of the respondent became involved in an altercation, out of which arose the present action for damages for assault and battery.

On September 16, 1953, approximately one year, one and a half months from the date of the incident, appellant caused to be filed in the United States District Court for the Northern District of California, Southern Division, a complaint for assault and battery. (Pages 3-7 Transcript of Record.)

Thereafter, respondent filed an answer to said complaint, denying generally the allegations of the com-

plaint, and setting forth affirmatively the defense of laches. (Pages 7-12 Transcript of Record.)

The matter was set for trial and was heard by the Honorable Oliver J. Carter, Judge of the United States District Court. At the commencement of said trial the matter was transferred from the civil to the admiralty side of the court, and was tried in admiralty in October, 1955. (See Memorandum and Order, page 13, Transcript of Record.)

At the outset of the trial, counsel for respondent moved for judgment on the pleadings on the ground that the action was barred by the statute of limitations. This motion was taken under submission, ruling thereon reserved, and the matter was tried.

On August 2, 1956, Judge Carter rendered a "Memorandum and Order" dismissing the case on the grounds that the action was barred either by the statute of limitations or the doctrine of laches. (Transcript of Record, pages 13-16.)

The questions involved in this appeal are:

1. Whether the general maritime law of the United States is the law applicable to the case; and
2. Whether the statute of limitations of the State of California is as a matter of law applicable to the case.

SPECIFICATION OF ERRORS.

Appellant respectfully urges that the trial court erred in the following respects:

1. In applying the statute of limitations of the State of California, Section 340 (3) of the Code of Civil Procedure.

2. In adopting by analogy under the doctrine of laches, as a matter of law, the statute of limitations of the State of California, Section 340 (3) of the Code of Civil Procedure.

ARGUMENT.

It is essentially appellant's position that the within action is one to be adjudicated and determined according to the general maritime law, and that under the maritime law the doctrine of laches is to be applied in accordance with all the equities of the case, and not by mechanically applying a state statute of limitations.

Section 644a of 48 U.S.C.A. specifically states that "All civil acts and deeds . . . shall be adjudicated and determined . . . according to the laws of the United States relating to such civil acts . . . on such ships or vessels on the high seas, which laws for the purpose aforesaid are extended over such islands, rocks and keys."

That the laws of the United States referred to by Congress is the general maritime law of the United States is unquestionable. In *The Lottawana*, 21 Wall.

558, the Supreme Court of the United States, in discussing the maritime law, states as follows:

“That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States is extended ‘to all cases of admiralty and maritime jurisdiction. . . .’ One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other and with foreign States.”

The saving clause contained in 28 U.S.C.A., Section 1333, does not alter the fact that all causes falling under the general maritime jurisdiction of Federal Courts are to be adjudicated and determined according to the general maritime law. Thus, in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, at page 384, the Supreme Court states:

“The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. (Bouvier’s Law Dictionary.) Plainly, we think,

under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law."

And in *Jansson v. Swedish American Line*, 183 Fed. 2d 212, at 216, the Court states as follows:

"We take it now to be established by an impressive body of precedent that when a common law action is brought, whether in a State or in a Federal Court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied by an admiralty Court — that is, the general maritime law, as developed and declared, in the last analysis, by the Supreme Court of the United States, or as modified from time to time by act of Congress."

See also *Roth v. Cox*, 210 Fed. 2d 76, 80.

It seems clear that whether an action is brought in the admiralty or the civil side of the Federal Court, the laws and rules governing the determination of such action, if it concern a right enforceable in admiralty, are the laws and rules as set forth in the general maritime law of the United States, and that the saving clause in 28 U.S.C.A. 1333 in no wise affects the application of the maritime law. This is clearly pointed out by the Court in *Cline v. Price*, 239 Pac. 2d 322, at 326:

“The saving clause, 28 U.S.C.A. 1333 (1) was never intended as a device whereby litigants could escape the uniform application of the established principles of admiralty law, as contemplated by the Constitution.”

Indeed, if the State Courts or the civil side of the Federal Courts were to apply different standards and rules, the very purpose of the saving clause would be obviated. Thus, in *Garrett v. Moore-McCormack Co., Inc., et al.*, 317 U. S. 239, the Court states:

“If by its practice the State Court were permitted substantially to alter the rights of either litigant, as those rights were established in Federal law, the remedy afforded by the State would not enforce, but would actually deny, Federal rights, which Congress, by providing alternative remedies, intended to make not less, but more secure.”

Thus, in the present case, the rights of the plaintiff are governed by the general rules of maritime law as is evidenced from the act in question, 48 U.S.C.A. 644a.

One of the basic and most fundamentally established principles of maritime law is that there is no statute of limitations barring the enforcement of a right recognized by admiralty. In lieu of any statute of limitations, the maritime law applies the doctrine of laches. What is laches has been set forth concisely by the Court in the case of *U. S. v. Alex Dussel Iron Works*, 31 F 2d 535, in which the Court states at page 536:

“Laches consist of two elements, inexcusable delay in instituting suit, and prejudice resulting to defendant from such delay. *Its existence depends upon the equities of the case, and not merely upon the lapse of time.*” (Emphasis added.)

That the trial court may by analogy adopt a local statute of limitations under proper circumstances is not questioned. To do so, however, the Court should not act mechanically, and apply the statute as a matter of law, as the Court did in the instant case, but rather should weigh the equities of the case, and require the showing of (1) inexcusable delay, and (2) resulting prejudice to the defendant.

Thus, in the recent case of *LeGate v. The Panamolga*, 221 F 2d 689, the Court states at page 691:

“We are not disposed, however, to mechanically apply the analogous state statute of limitation without regard to the equities.”

And further, on page 691:

“We remand the case to the District Court with a direction to reconsider the question of laches *placing the burden on the respondent to show inexcusable delay in filing the suit, with resulting prejudice to the respondents.*” (Emphasis added.)

The Supreme Court recently affirmed the position in the case of *Gardner v. Panama Railroad*, 342 U. S. 29. The Court stated at page 31:

“Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and on a mechanical application

of the statute of limitations. *The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to defendant has ensued from the mere passage of time, there should be no bar to relief.*" (Emphasis added.)

It is obvious from the "Memorandum and Order" entered by Judge Carter (Transcript of Record, pages 13 to 16) that the Court mechanically applied the statute of limitations of the State of California, and failed to decide the matter on the equities, that is, no finding or showing is made either that the delay in bringing suit was inexcusable or that prejudice to the defendant resulted from the mere passage of time.

CONCLUSION.

It is respectfully submitted that this is a matter properly triable by maritime law, and that the Honorable District Court erred in dismissing the matter on the ground that laches existed as a matter of law. Appellant respectfully requests a reversal of said order, and a remanding of the matter for a new trial.

Dated, Oakland, California,

December 26, 1956.

Respectfully submitted,

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No. 15,281

United States Court of Appeals
For the Ninth Circuit

JOHN YANDELL,

Appellant,

VS.

TRANSOCEAN AIR LINES, a Corporation,

Appellee.

BRIEF FOR APPELLEE.

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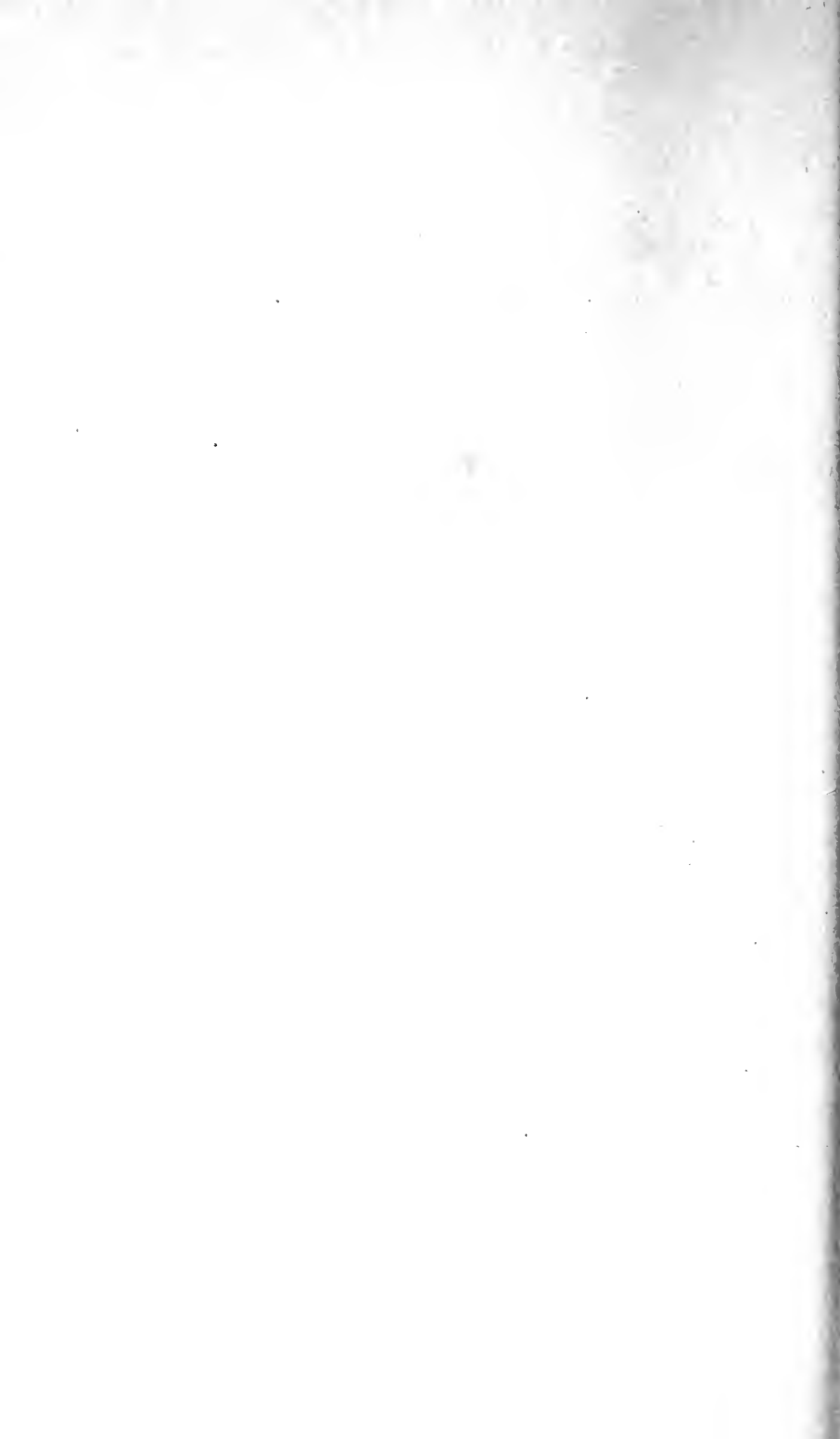
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No. 15,281

**United States Court of Appeals
For the Ninth Circuit**

JOHN YANDELL,

Appellant,

vs.

TRANSOCEAN AIR LINES, a Corporation,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Appellee agrees with appellant (BA 3) that jurisdiction of this court to review the order of the District Court is sustained by 28 U.S.C., §1291. But "serious jurisdictional questions" were raised below which should not be ignored on appeal. The District Court did not pass upon those questions. (R 14.) It dismissed the action on the ground that it was barred by either limitations or laches. (R 14-16.)

The complaint in the action was filed September 16, 1953, on the civil side of the court. (R 3-7.) It alleged that on July 31, 1952, an air pilot (plaintiff Yandell) employed by Eastern Airways was assaulted and injured by the manager of a mess hall (defendant Sorenson) in the mess hall owned and operated by his

employer (defendant Transocean) on Wake Island. (R 3-6.) For incurred injuries plaintiff Yandell sought general damages of \$150,000, exemplary or punitive damages of \$100,000, and special damages in unascertained amounts. (R 6-7.)

An answer was filed by defendant Transocean on October 12, 1955. (R 7-12.) Among other things the answer averred the defenses of laches and limitations. (R 12.)

Jury trial was demanded by plaintiff Yandell and the case set for trial by jury. (R 13.) At the trial of the action in October of 1955, plaintiff Yandell waived a jury and on his motion the case was transferred to the admiralty side of the court and the case tried in admiralty before the court. (R 13.) The court reserved ruling on a motion for judgment on the ground that the action was barred by the statute of limitations, and also on a motion to restore the case to the civil docket. (R 13-14.)

As bases for jurisdiction of the District Court appellant invokes and quotes 28 U.S.C., §1333, and 48 U.S.C., §644a. Appellee is of the view that jurisdiction of the District Court may not be sustained under either of the said sections.

Section 1333 of 28 U.S.C. provides generally that "district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled". Since plaintiff's case merely

involved a nonmaritime tort, namely, assault and battery by one person upon another on land, it is very obvious that the case was not one cognizable in admiralty. (*The Sarah*, 21 U.S. (8 Wheat.) 390-391, 5 L.Ed. 644, 645; *United States v. Matson Nav. Co.*, 9 Cir. 1953, 201 F. 2d 610, 613.) Therefore, jurisdiction of the District Court may not be sustained under said section 1333.

The position apparently taken by appellant is that section 644a of 48 U.S.C. contains the fiction that a nonmaritime tort on Wake Island is a maritime tort, and that thereby the admiralty jurisdiction of every United States District Court has been extended, expanded, or implemented to make such nonmaritime torts universally cognizable in admiralty.

Said section 644a is part of the Organic Act of the Territory of Hawaii. By its very terms the section is confined to the jurisdiction of the United States Court *for the District of Hawaii* and to procedure *therein*. The section ends with the provision that "The laws of the United States relating to juries and jury trials shall be available to the trial of such cases before *said* District Court." (Emphasis added.) Unlike the Death on the High Seas Act (46 U.S.C., §761), recently reviewed by this court in *Higa v. Transocean Airlines*, 9 Cir. 1955, 230 F. 2d 780, 783, the words "in admiralty" do not appear in said section 644a. Fairly considered, the conclusion cannot be avoided that the section confers jurisdiction upon the District Court of the United States *in Hawaii* and upon no other District Court, and that civil and criminal jurisdiction

as distinguished from admiralty jurisdiction is conferred.

Therefore, appellee cannot agree with appellant that jurisdiction of the District Court may be sustained under 28 U.S.C., §1333 or 48 U.S.C. §644a.

STATEMENT OF THE CASE.

On the record before the court, any statement of the case would be incomplete and inadequate, for the record of the trial is not included therein. From the Memorandum and Order of the trial court (R 13-16) it appears that an extensive trial occurred at which witnesses were sworn, evidence was introduced, and various motions were made. None of this appears in the record on which the appeal is presented. It is elementary that an appellant must present a record sufficient to affirmatively show the error he asserts. The appellant here has not done so. On the inadequate and incomplete record before the court it is respectfully submitted that the appellant has not shown and cannot show that the trial court abused its discretion in dismissing the action.

- 1. THE DISTRICT COURT EXERCISED A SOUND DISCRETION IN DISMISSING THE ACTION, AND THE ORDER APPEALED FROM SHOULD THEREFORE BE AFFIRMED.**

Appellant's sole contention is that the case was in admiralty and therefore governed by the doctrine of laches rather than the local statute of limitations, and

that the court erred in holding that it was bound by the local statute of limitations. Appellant is mistaken. The court carefully pointed out:

“However, it is not necessary to decide the jurisdictional questions which may flow from this Section (48 U.S.C., §644a) because the action must be dismissed *whether tried in admiralty or as a civil action.*” (Emphasis added.)

As appellant must necessarily concede that his action was properly dismissed if it was a civil action (and appellee insists that it was), there is no occasion to pursue that phase of the case.

On the rules applicable to the doctrine of laches in cases in admiralty, it was said by this court in *Wilson v. Northwest Marine Iron Works*, 212 F. 2d 510, at page 511:

“The Oregon statute relating to actions for personal injuries requires that they be brought within two years. * * * In applying the doctrine of laches courts of admiralty customarily follow the analogy of the state statute of limitations and hold the claim barred unless the libellant shows special circumstances excusing the delay. *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.*, 9 Cir., 73 F. 2d 200; *Redman v. United States*, 2 Cir., 176 F. 2d 713. It is further the rule that when the libel discloses that the statute has already run it becomes incumbent on the libellant to plead and prove facts negating laches or tolling the statute. ‘Detriment to the adverse party is presumed from delay for the statutory period unless the contrary is shown.’ *Redman v. United States*, supra, 176 F. 2d at page 715. Such is the rule in this circuit,

also. *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.*, supra. And to the same effect see *Kane v. Union of Soviet Socialist Republics*, 3 Cir. 189 F. 2d 303."

None of the cases cited in the brief for appellant sponsors any different rules in cases like the present where it appeared on the face of the complaint that the California statute of limitations had already run, and plaintiff neither by pleading nor proof showed any facts negating laches or the tolling of the statute. Even on the inadequate and incomplete record before the court it therefore affirmatively appears that the trial court exercised a sound discretion in dismissing the action "whether tried in admiralty or as a civil action". (R. 14.)

CONCLUSION.

The order appealed from is sound in law and sound in fact, and appellee therefore respectfully submits that it should be affirmed.

Dated, Oakland, California,
January 22, 1957.

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No. 15,281

United States Court of Appeals
For the Ninth Circuit

JOHN YANDELL,

Appellant,

VS.

TRANSOCEAN AIR LINES, a Corporation,

Appellee.

APPELLANT'S CLOSING BRIEF.

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No. 15,281

**United States Court of Appeals
For the Ninth Circuit**

JOHN YANDELL,

Appellant,

VS.

TRANSOCEAN AIR LINES, a Corporation,

Appellee.

APPELLANT'S CLOSING BRIEF.

JURISDICTION.

Appellee has raised the question of the jurisdiction of the United States District Court for the Northern District of California, Southern Division, to hear the within matter, and argues that the situs for the trial should have been the United States Court for the District of Hawaii.

The legislative history of 48 U.S.C.A. 644a is contained in 1950 U. S. Code Congressional Service, page 2503. Therein contained is a letter from the Department of Justice to the Chairman of the Judiciary Committee, signed by Peyton Ford, the Assistant to the Attorney General, which states in substance that the law in effect on August 4, 1949, with reference to the islands involved, did not cover the following points:

(1) Specify the body of substantive law applicable to these islands.

(2) Give the District Court for the District of Hawaii jurisdiction of all civil as well as criminal cases arising there.

(3) Deal with the problem of jury trials.

(4) Acknowledge the special status of Canton and Enderbury Islands, and

(5) Specify the situs for the trial of these cases.

It will be noted that the present act, 48 U.S.C.A. 644a, covers all but the last of these points. In other words, the present act leaves out only the situs for the trial of these cases. The letter from the Department of Justice indicates that the Department of Justice had studied a proposed bill sent to them by the Judiciary Committee for their comments and recommendations. In discussing the proposed bill with the former bill, which was contained in Title 48 U.S.C. 642a, the Department of Justice states in their letter as follows:

“The present bill departs from the latter by containing no provision that the situs for the trial of civil and criminal cases shall be the situs of the United States District Court for the District of Hawaii.”

It is therefore obvious that the attention of the Legislature was called to the fact that no provision for the situs for the trial of such cases was made.

In addition the Justice Department attached, as an appendix, a suggested bill drawn up by the Justice Department which did contain such a provision.

It appears, therefore, that no provision for venue of cases falling under Title 48 U.S.C.A. 644a, having been made, the question of venue must be decided with reference to the general rules of venue.

The jurisdiction of the United States District Court for the Northern District of California, Southern Division, with regard to the within matter is contained in 28 U.S.C.A., Section 1333:

“The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

THE RECORD ON APPEAL.

The ground for dismissal as set forth by the Honorable District Court on pages 13 to 16 of the transcript of record is that as a matter of law the action was barred, either by the Statute of Limitations or by the Doctrine of Laches. The question on appeal therefore is a question of law and not a question of fact that would in any way be altered by a transcript of record containing all of the testimony adduced at trial.

It is respectfully urged that for the purposes of this appeal the record is adequate.

ARGUMENT.

The Honorable Court's attention is again directed to the cases of *U. S. v. Alex Dussel Iron Works*, 31 F.2d 535; *LeGate v. The Panamolga*, 221 F.2d 689, and *Gardner v. Panama Railroad*, 342 U.S. 29. As set forth in the brief for appellant, these cases emphasize that the question of laches is a matter not to be mechanically applied; that a state statute of limitations is not necessarily governing, and that inexcusable delay and prejudice to the defendant, rather than mere lapse of time, must be shown.

CONCLUSION.

It is respectfully submitted that the Honorable District Court erred in dismissing the within action and that appellant is entitled to a new trial.

Dated, Oakland, California,
February 19, 1957.

Respectfully submitted,

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No. 15,282

IN THE

United States Court of Appeals
For the Ninth Circuit

RENALDO FERRARI, et al.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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No. 15,282

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RENALDO FERRARI, et al.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

On February 23, 1956 an indictment was filed in 16 counts against appellants and others in the United States District Court for the Northern District of California, Southern Division, charging violations of the Harrison Narcotic Act (26 U.S.C. Secs. 4704 & 7237 (1954 ed.)); the Jones Miller Act (21 U.S.C. Sec. 174); and conspiracy to violate said acts (18 U.S.C. Sec. 371) (Tr. 3-16). All appellants were named as defendants in the 16th count which charged a conspiracy to violate the Jones-Miller and Harrison Narcotic Acts (Tr. 11-16), and in addition, appellant Lester Darneille was charged in count one with violation of the Harrison Narcotic Act and in count two

with violation of the Jones-Miller Act (Tr. 5-6). The remaining counts of the indictment related to two co-defendants, Charles Garcia, Sr., and Charles Clarence Garcia, Jr., who pleaded guilty to certain of the charges prior to the commencement of the trial.

After a jury trial all appellants were found guilty as charged on count 16, and appellant Darneille was found guilty on count one and not guilty on count two (Tr. 41). Sentence was imposed and judgment entered on July 3, 1956, each defendant receiving a term of five years imprisonment and a \$1.00 fine (Tr. 64-72).

Appellant Renaldo Ferrari filed his notice of appeal on July 13, 1956 (Tr. 77-78). Appellant John Orman Knight filed his notice of appeal on July 5, 1956 (Tr. 74-75); appellant Lester Darneille filed notice of appeal on July 9, 1956 (Tr. 76), and appellant Jack Cherpakov filed notice of appeal on July 11, 1956 (Tr. 73).¹

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1291.

QUESTIONS PRESENTED.

1. Was the evidence sufficient to support the verdict as to appellants Ferrari and Darneille?

2. Was newspaper publicity prejudicial to appellants Ferrari and Darneille in the absence of a showing that the jury had seen the articles; in the absence

¹Appellants were each granted leave to proceed to prosecute appeal in forma pauperis (Tr. 79-86, 90). Appellants Knight and Darneille are proceeding in pro. per. but no brief has been filed by Appellant Knight at the time of preparation of appellee's brief.

of a motion for a mistrial on behalf of appellant Darneille; in the light of unobjected to instructions to the jury to disregard any newspaper account; and in the absence of any proper record setting forth the language of the account?

3. Was the testimony of rebuttal witness Gloria Davis properly admitted to impeach the credibility of appellant Ferrari after he had opened the door on direct examination by denying having possessed or seen narcotics during the period in question?

4. Was it error for the government to fail to produce a witness whose whereabouts were unknown?

5. Were appellants entitled to an instruction that an unfavorable inference might be drawn from non-production of evidence, when it had been shown that the evidence was not available and its absence had been explained?

6. (a) Was it error for the court to respond in writing to an inquiry in writing from the jury, when all counsel were available but not present, but had chosen co-counsel to represent them and were afforded opportunity to be present and to object to the instruction thus given?

(b) Was the supplemental instruction a correct statement of the law?

STATEMENT OF THE CASE.

Appellant Cherpakov does not question the sufficiency of the evidence to support his conviction

(Cherpakov Opening Brief, page 5). The sufficiency of the evidence is raised by appellants Ferrari (Ferrari Opening Br., pp. 7-10) and Darneille (Darneille Br., pp. 4-5).

Each appellant in his statement of the case has extracted only fragments of the testimony, and in order to aid this court in reviewing the sufficiency of the evidence, appellee deems it necessary to restate the evidence in more complete detail.

Clifford S. Hubach, a chemist for the United States Treasury Department in San Francisco, California, identified Exhibit 1, a paper bag with six rubber containers therein, as having been received by him from Agents Feldman and Wu on August 15, 1955 (Tr. 5-6). He analyzed the contents of the package and determined it contained 13 ounces and 6 grains of a narcotic drug (Tr. 6-9). Exhibits 2 and 3 each contained 400 grains of heroin (Tr. 10, 13) and Exhibit 4 contained 6 grains of heroin (Tr. 13-14).

William J. Gowans, a chemist for the United States Treasury Department, San Francisco, California, identified Exhibit 5 as containing 10 grains of heroin (Tr. 17-18), and Exhibit 6 as containing 437 grains of heroin (Tr. 18-19) and exhibit 7 as containing 365 grains of heroin (Tr. 19-20).

Ira Charles Feldman, an agent of the Federal Bureau of Narcotics, first met appellant Ferrari at *Ciro's Bar*, 645 Geary Street, San Francisco on July 6, 1955, where Ferrari was bartender (Tr. 21-23). During a conversation Feldman told Ferrari that he was an "investment broker" from the east; that he

“bought and sold things, small things, something I could put in my pocket, carry around, and turn over a fast buck.” Ferrari replied that he knew what Feldman wanted, but things were pretty tight, and asked Feldman to return later (Tr. 24).

On July 8, 1955 at Ciro's Bar, Feldman was introduced by Ferrari to appellant Knight. (Tr. 25.)

On July 17, 1955 at Ciro's Bar, Feldman invited Ferrari to come up to his apartment and talk; he told Ferrari he thought they could make a deal. Ferrari was unable to make the visit that evening, but said he was sure within a few days he could come up and would be happy to talk to Feldman (Tr. 27-28).

On July 20, 1955 again at Ciro's Bar, Feldman met appellants Ferrari and Knight and invited them to his apartment. Ferrari said he couldn't make it, but that Knight could make it (Tr. 28-29). Later that evening Feldman was joined at the bar by Miss Janet Jones alias Janet Howard, a special employee of the Bureau of Narcotics. After further social conversation, Knight received the address and telephone number of Feldman's apartment, and said he would come to the apartment with his lady friend, Marie Hagler, after the bar was closed (Tr. 29-30).

On the early morning hours of July 21, 1955, at about 2:45 a.m., Knight and Miss Hagler arrived at Feldman's apartment. While Misses Jones and Hagler were absent from the room appellant Knight asked Feldman, “What do you want, black or white?” (Tr. 30-31). Feldman asked what he meant, and Knight replied, “Junk.” (Tr. 31-34, 192.) Feldman testified

that in the narcotics trade the term "white" referred to heroin, "black" referred to opium, and "junk" was a term used to signify narcotics (Tr. 32-33). Knight cautioned that "stuff" was hard to get, and that because of the narcotic agents they had to be careful but that he would contact Feldman the next day (Tr. 32, 34). A further general discussion relative to narcotics and the situation in San Francisco was had when the women returned to the room (Tr. 33).

On the evening of July 22, 1955 Feldman again met appellants Knight and Ferrari at Ciro's bar, and was introduced by Ferrari to appellant "Bones" Darneille (Tr. 35-36, 92-93).² During a conversation, Ferrari accepted an invitation to go to Feldman's apartment after the bar was closed and took Feldman's address and telephone number (Tr. 36). Appellant Ferrari informed Feldman that Darneille and Mifflin would attend the meeting, and Mifflin, Darneille, Miss Jones and two females identified only as June and Jyrene, who were obtained at another location, thereafter proceeded to Feldman's apartment (Tr. 36-37). In the absence of the females a conversation was had between Feldman, Mifflin and Darneille during which Darneille said he knew what Feldman did; that they could get together in a couple of days and make a "grand" apiece; that he had "connections" all over San Francisco and Dave (Mifflin) had connections in

²Also present at this meeting was Dave Mifflin, a defendant at the trial who was convicted by the jury, but as to whom a motion for judgment of acquittal was thereafter granted by the trial judge. Mifflin did not testify at the trial.

Minneapolis and "Vegas"; that "we will get together and we will all make a buck." Darneille said that he "wouldn't move anything less than a pound and mostly kilos." (Tr. 38.)

During the conversation Feldman told Darneille that he had "made a pitch to a guy about narcotics" the night previous, and Darneille replied, "I know about the pitch. Red Knight told me." (Tr. 38-39.)

On the morning of July 23, 1955 Feldman received a telephone call from appellant Knight during which Knight said that "Bones still wanted to see me and deal with me," and a later telephone call the same morning to the effect that Bones was still thinking of him (Tr. 42).

On the evening of July 26, 1955 and morning of July 27, 1955 Feldman met appellant Darneille at Harold's Rebound Club, during which time he asked Darneille to come to his apartment so they could talk and straighten out the deal (Tr. 43, 112-113). Later at the apartment Darneille stated that he had fooled with narcotics for the last twenty five years, had smoked opium for 15 years, and had "kicked" the habit just three years ago. He said "Within a few days, Ike, we will have a deal," that they would all make money, and that there was nothing about "junk" he didn't know (Tr. 43-44, 114-115). Arrangements were made for another meeting at the Rebound Club that evening (Tr. 44-45).³

³Ciro's Club was closed during this period by state authorities (Tr. 39-40; 42).

On the evening of July 27, 1955 at Harold's Rebound Club appellant Darneille introduced appellant Cherpakov to Feldman as "Jack Cherry" (Tr. 46). In a later conversation appellant Cherpakov said, "Ike, you are doing pretty good. You are here only a month and you are scoring already." When Feldman remarked that he hadn't "scored" yet, Cherpakov replied, "Well, don't worry, you are. You can't get any bigger than Red Ferrari. If you do right by Red, you will be O.K. If you do wrong by Red, you will end up in an alley." (Tr. 47.)

At Feldman's apartment later that night appellant Darneille told Feldman that it was o.k. the next day or two; that he would make \$10,000; that Cherpakov would make \$10,000 and that Feldman would make \$100,000. Cherpakov said that he was ready right then; that he could come up with one hundred "pieces," but that he needed a reference. Feldman agreed to provide the reference the next day. During this same conversation Cherpakov commented that "Right now we are committing a conspiracy." (Tr. 49.)

On July 28, 1955 Feldman observed that Ciro's Bar was reopened, and he found appellants Ferrari, Cherpakov and Darneille present therein. Darneille informed him that they had a deal, and that it was all set in a day or so (Tr. 50, 125). After the departure of Cherpakov and Darneille from the bar, appellant Ferrari asked Feldman if he was going to do business with them and was informed by Feldman that he was (Tr. 51).

During the conversation with Cherpakov and pursuant to the previous arrangement, Feldman gave Cherpakov a paper on which was written the name, address and telephone number of a New York gangster, telling him that this was his reference. Cherpakov took the paper and said that he would "take you up, Ike." (R. 51.)

On July 29, 1955 there was further discussion at Ciro's between Feldman and Darneille, while Ferrari was tending bar, concerning a "deal" in a day or two (Tr. 52, 129). Again, on July 30, 1955 at Ciro's bar, Darneille told Feldman that the deal was ready any minute and to just hang on (Tr. 53).

Finally, on July 31, 1955, at Ciro's bar, while Ferrari was bartending, Darneille asked Feldman if he knew Charlie Garcia at the Macombo. Feldman replied that he had heard of him, and Darneille then said, "Go see him to get the junk." (Tr. 53.)

That same night, about 12:45 a.m., on the morning of August 1, 1955, Feldman introduced himself to Charles Garcia, Sr. at the Macombo Bar. Garcia had been expecting him; he knew where Feldman's apartment was before he was told; and he agreed to meet Feldman there as soon as the bar closed (Tr. 53-54, 142).

Approximately three a.m. on the morning of August 1, 1955 Charles Garcia, Sr. and another man whom he introduced as his brother Bob arrived at Feldman's apartment. Feldman subsequently identified the man named "Bob" as Charles Clarence Garcia, the son of Charles Garcia, Sr. At that time Feldman told them

that he had given them his references and showed them the money he had available. They agreed to return the following evening after checking with their friends as to what they could get and how much. Charles Garcia, Sr., said that "they wouldn't move for less than a pound or even a kilo." (Tr. 55-56.)

Charles Garcia told Feldman that appellant Ferrari was a "good guy" and that it was O.K. to deal with him (Tr. 56).

On August 2, 1955, about 9:30 p.m. the two Garcias returned to Feldman's apartment and said that they had contacted their associates and that they could get as much (narcotics) as Feldman wanted and whenever he wanted it; but that "my people" didn't want to get caught and were going to "take it easy." (Tr. 57.) Garcia, Sr., quoted a price of \$450 an ounce, and Feldman made a counter offer of \$400 an ounce and agreed to buy a kilo at that price. Garcia, Sr. then left to make a telephone call to determine if this was satisfactory, and returned about an hour later to state that he had "made a phone call and saw my people" and that the deal was O.K. for \$400 an ounce; that only one pound would be obtained the first time and that if it was satisfactory they could start dealing in kilos (Tr. 58).

Feldman thereupon paid over to the Garcias the sum of \$6400 in \$100 bills (Tr. 59).

Thereafter, on the early morning of August 13, 1955 Feldman received delivery from Charles Clarence Garcia of 13 ounces, 365 grains of narcotics from cabin 25 of the Bayside Motel, San Francisco, Cali-

fornia. Feldman identified Exhibit 1 as the narcotics received by him on this occasion (Tr. 61-70).

On August 17, 1955 Feldman informed Charles Garcia, Sr. that the narcotics were of inferior quality (Tr. 71-73). On August 17, 1955, at Ciro's Bar, appellant Cherpakov told Feldman that it was "rough" the way he dealt in pound lots (Tr. 76) and later, on August 22, 1955 in the presence of appellant Darneille, Cherpakov expressed regret that the stuff wasn't any good and discussed the purchase of heroin at Juarez, Mexico for \$100 an ounce and the expense of bringing it across the border (Tr. 77-78). On the same occasion, Cherpakov made further reference to the fact that Feldman had been in town only a month and had "scored" already and that "There's none bigger than Red Ferrari and Ciro's." (Tr. 80.) Feldman had not previously discussed with any appellant the quality or quantity of the narcotics delivered or the fact that such a purchase had been made (Tr. 73, 80-81).

Feldman also testified that on August 2, 1955, at the time the \$6400 was delivered to the Garcias, he had told them that he had been under the impression that "Bones" Darneille was "Bones" Remmer. He did not thereafter mention this misunderstanding to anyone (Tr. 74-75, 110-112). On the evening of August 17, 1955 Feldman and appellant Ferrari had a conversation at which time Ferrari said he was sorry that there had been a misunderstanding and that "Bones" Darneille would be in Ciro's later and they could straighten it out (Tr. 73-75). Ferrari refused a dinner

invitation from Feldman, saying, "Look Ike, *I know what you are doing. I know who you are dealing with.* I don't know about your deals. I can't go out with you. Like I told you once before, I don't want no trouble, and we aren't going to have any trouble." (Tr. 75.)

Feldman thereafter identified Exhibits 2, 5 and 6 as being further quantities of heroin purchased at various times from Charles Garcia (Tr. 81-87).

On cross-examination Feldman testified that Marie Hagler, appellant Knight's girl friend, told him that Knight and appellant Ferrari were "behind the whole business" with reference to the \$6400 sale of narcotics (Tr. 176-177, 205-206).

It was also developed for the first time on cross-examination that the apartment occupied by Feldman had been wired to record the conversations therein (Tr. 90, 160-163; 183; 187; 200-201), and that the listening devices had been monitored by other agents in an adjoining room. No demand was made by any defendant for the production of the tapes or recordings.

On redirect examination agent Feldman testified that the recordings had been used to prepare reports, and the records then reused with the result that the old conversation was erased as new conversation was recorded (Tr. 206-207). Testimony offered through Agent Milton Wu as to the conversations heard by him by means of the loudspeaking devices was rejected by the court upon objection by the defendants (Tr. 207-213; 229-230).

William H. Grady, an agent of the Federal Bureau of Narcotics, testified that on August 4, 1955 he had accompanied District Supervisor White to *Ciro's Bar*, and had a conversation with Ferrari concerning a letter (Exhibit 8) which had been received in the office of the Bureau of Narcotics to the effect that two men had approached Ferrari concerning narcotics, and that he was fearful they were attempting to involve him in the narcotics traffic (Tr. 217-219). Ferrari was certain that the men were talking about narcotics, not some other contraband (Tr. 220). Ferrari was furnished with Grady's telephone number and asked to call if the men returned (Tr. 220). Agent Feldman entered *Ciro's Bar* later that evening, but Grady was not contacted by Ferrari (Tr. 60-61, 221). Instead, Ferrari warned Feldman that the government was looking for him, and they had a drink together (Tr. 61).

Murrey C. Peck, manager of the Bayside Motel, identified the registration card reflecting rental of Cabin 25 for the morning of August 13, 1955 to a person driving an automobile with license B 77217 (Tr. 231-235; Ex. 9).

James H. Mulgannon, an agent of the Bureau of Narcotics, testified that he had previously observed appellant Ferrari driving a 1955 Ford Coupe with 1955 California license plates 1L46628, and that on October 5, 1955 he observed this automobile being driven by appellant Knight to the residence of defendant Charles Garcia (Tr. 235-237). Mulgannon was in Garcia's residence at the time, and he observed

Knight knock at the door and depart when there was no response, and he observed him driving past the house slowly about 45 minutes later (Tr. 238).

THE DEFENSE CASE.

Lester Darneille testified that he was commonly known as "Bones" and was employed as a waiter (Tr. 254-255). He had quite a few arrests for felonies, but some of them were reduced to misdemeanors and he was convicted in 1951 of possession of narcotics, and was presently on parole (Tr. 255-256).

He admitted meeting agent Feldman at *Ciro's* on July 22, 1955, although he knew him only as "Ike" (Tr. 258-260, 287). After several drinks he accompanied Agent Feldman, the girl known as Janet, and defendant Miflin to Feldman's apartment (Tr. 260-261), together with two girls who had been obtained enroute by Janet (Tr. 262). At the apartment there were more drinks and food served (Tr. 263). At one period, when only defendant Miflin, appellant Darneille and Feldman were present, Feldman said he wanted to get into some kind of business where he could make money (Tr. 264). Darneille denied any discussion relating to narcotics, and said he was intoxicated when he departed (Tr. 265-267).

Darneille had been addicted to narcotics for twenty years off and on, but not for the past five years (Tr. 267).

He next saw Feldman at *Harold's Rebound Club*, but was not certain of the date (Tr. 268). He was

drunk that night, and he again accompanied Feldman and Janet to the apartment (Tr. 268). There "could have been" a discussion of narcotics at that time (Tr. 268). He thought Feldman asked him how many ounces were in a kilo, and he said he didn't know (Tr. 269).

The following night he again met Feldman at Harold's Rebound Club by prior arrangement (Tr. 269). He was accompanied by appellant Cherpakov (Tr. 270). After Janet arrived they went to other bars and continued drinking, and later returned to Feldman's apartment in the early morning hours (Tr. 271-273). There was a discussion of narcotics in Feldman's apartment, during which Feldman said he was here from the east to buy narcotics (Tr. 273). Darneille denied the testimony of Feldman concerning this conversation (Tr. 274-275) and subsequent conversations in Ciro's concerning a "deal" but admitted seeing Feldman on those occasions (Tr. 275-277).

Appellant Darneille admitted knowing Charles Garcia, having met him in San Quentin (Tr. 278), and he had visited at Garcia's home in April or May a year ago (Tr. 278-279). He denied having told Feldman to see Garcia at the Macombo to get the "junk" (Tr. 280). He testified he had not seen Garcia from spring of 1955 to about September 11 or 12, 1955, when at an accidental street meeting Garcia informed him that he had sold "milk and sugar" to Feldman for \$6500 (Tr. 283-285, 340-342).

About August 10, 1955, appellants Darneille and Cherpakov met the girl Janet Howard on the street and she informed them that Feldman was an agent

On cross-examination Darneille admitted that he had also used the given name Robert and the surname Thomas in connection with previous arrests to avoid family embarrassment (Tr. 293). From 1930 to 1950 he purchased and used opium, morphine and heroin (Tr. 294-295).

He was a regular customer of *Ciro's Bar* and had known appellant Ferrari since 1935 or 1936, and had been on intimate acquaintance to the extent of borrowing money during the past 18 months he had been out of the penitentiary (Tr. 295, 320-321). He also knew appellant Cherpakov for about a year, having met him at *Ciro's* (Tr. 295-296); and he had known appellant Knight for 10 or 15 years and most closely during the past 18 months at *Ciro's* (Tr. 296). He was once employed by defendant Mifflin as a bartender and knew him since about 1940 (Tr. 296-297). He met Charles Garcia in 1952 in San Quentin (Tr. 297), and Charles Garcia, Jr. about a year ago (Tr. 298).

Darneille knew Janet Black⁴ or Howard as a narcotics user, and had met her husband Jimmy Black, in the county jail while serving a sentence for possession of narcotics in 1950 (Tr. 299-300).

He admitted that at different times he had purchased narcotics in large quantities, such as contained in Exhibit 1 (Tr. 314); that he may have told Feldman that he "could write a book about the stuff" (Tr. 315), but denied conversation concerning sale of narcotics (Tr. 312-316).

⁴Janet Jones is referred to at times as Janet Howard and Janet Black, and as Janice or Jan.

Appellant Darneille admitted that appellant Cherpakov had made a comment to the effect that they were then engaging in a conspiracy, but that it was in Feldman's absence from the room (Tr. 332).

Renaldo Ferrari admitted meeting agent Feldman while a bartender at *Ciro's* (Tr. 343-346). They had "the usual conversation a bartender has with a customer" (Tr. 344). Feldman said he was looking for some "fast money," and Ferrari informed him that conditions around town had been "very slow, very bad" (Tr. 346). Later Ferrari stated that the only discussion he had with Feldman relating to narcotics was on the occasion of the first meeting, and that on this occasion Feldman specifically told him he wished to invest in narcotics (Tr. 347-348, 381).

He denied introducing Feldman to appellant Knight (Tr. 348-349) or Darneille (Tr. 350) or that he sent either Knight or Darneille or Mifflin or Cherpakov to Feldman's apartment (Tr. 352).

Ferrari admitted that after a conversation with his attorney, a letter (Exhibit 8) was written to Colonel White of the Bureau of Narcotics, and that he thereafter received a visit from Colonel White and Agent Grady (Tr. 356-359, 389-393). He further admitted that Feldman also returned to the bar the same day or the next day, and that he told Feldman that the federal agents had been there and for Feldman to stay away "because if you get in trouble, I will get in trouble" (Tr. 360). Thereafter Feldman returned to *Ciro's* five or six different times; they bet on fights, and talked about numerous things (Tr. 362A). Fer-

rari did not notify the Bureau of Narcotics about these visits, although he had been requested to do so (Tr. 368-369, 393-395).

Appellant Ferrari was acquainted with both Charles Garcia, and Charles Clarence Garcia, and the former had patronized Ciro's during the period of the conspiracy (Tr. 364-366, 384-385). He denied any agreement or understanding with any of the remaining defendants to engage in the narcotics traffic (Tr. 367).

Although he at first denied he had been known by any other than his true name (Tr. 343), Ferrari later corrected his testimony to state that he had also used the name Stewart Ramsey in connection with the leasing of a pair of flats (Tr. 370).

On cross-examination, appellant Ferrari admitted that prior to his employment as bartender at Ciro's he had made his living as a gambler, and that he had been convicted in the Federal District Court of violations of the narcotics laws for concealment of heroin in 1948 or 1949, and was sentenced to three years imprisonment (Tr. 374-376). He was also convicted of a felony in the State of California relating to narcotics (Tr. 376-377).

Appellant Ferrari denied ever having purchased or sold narcotics (Tr. 387-388). The last time he had possession of narcotics was in 1937, and he had not had possession within the past year and a half (Tr. 400-401). Persons known to him as having had traffic in narcotics frequented Ciro's during the period he was bartender there (Tr. 401-404).

Jack Cherpakov, also known as Jack Cherry, was convicted in 1942 of a felony violation of the Selective Service laws and was sentenced to imprisonment for two years (Tr. 404-405, 432). He had known appellant Darneille for about a year as a close friend (Tr. 405, 432-433), but was not so well acquainted with defendant Miflin (Tr. 405-406). He met appellant Ferrari in 1939, and had started frequenting *Ciro's* bar about a year ago, where he also met appellant Knight (Tr. 406-407). He was also acquainted with Charles Garcia and Charles Garcia, Jr. (Tr. 407).

On July 27, 1955, in company with appellant Darneille, he met Feldman at Harold's Rebound Club, and after visiting various other establishments the three men and two girls went to Feldman's apartment (Tr. 407-417, 433-437). At the apartment Feldman told of his underworld background, and Cherpakov heard Feldman ask Darneille how many ounces were in a kilo, and if he knew the prices (Tr. 417-418, 439). Although his testimony had not mentioned narcotics to this point, he testified that he then told Darneille that "they can get you for conspiracy if you talk about it, so don't talk about narcotics" (Tr. 418-443). Also, "How do you know that this place isn't bugged?" and "What do you know about Ike?" (Tr. 419-443).

The only other conversation relating to narcotics concerned the addiction of one of the girls (Tr. 418-420).

Either the next day or two days later, at *Ciro's* bar, Feldman handed Cherpakov a slip of paper which

contained a name and New York telephone number (Tr. 421-423, 448-449). Later, when he asked Feldman what the paper was for, Feldman told him it was so he could check on him (Feldman) (Tr. 423, 450). He denied having asked for a reference, or having called the telephone number (Tr. 422-423).

Cherpakov met Feldman on various subsequent occasions, and particularly on the 4th or 5th of August, 1955, when Feldman told him he was looking for the two Garcias (Tr. 424-425, 451-453), and later when Feldman told him he had "connected," which Cherpakov understood to mean that he had purchased narcotics (Tr. 425-426, 461-463). He denied having had any conversations with any of the co-defendants concerning narcotics, except the one in Feldman's apartment (Tr. 426).

Cherpakov at one time used narcotics beginning in 1939, but had not been a user since 1948 (Tr. 426, 441-442).

On cross-examination, Cherpakov stated that he had followed the occupation of gambler for the past seven years (Tr. 429-430). He admitted meeting Feldman on July 27, 1955 but denied any conversation thereafter concerning appellant Ferrari (Tr. 436-437). He also denied specifically the conversations testified to by Feldman in the apartment to the effect that he was ready with a hundred "pieces," that he needed a reference, or that Feldman could be "bumped" for \$50 or \$100 (Tr. 443-445) and denied later conversations with Feldman to the effect that he could purchase narcotics for \$100 an ounce in Juarez or Mexicali (Tr. 463).

Marie Hagler, a friend of appellant Knight, who had first claimed to be his wife, testified to the visit on July 21, 1955 to Feldman's apartment with Knight (Tr. 466-473, 486-487). She admitted that narcotics had been discussed, but that Feldman had brought up the subject, and that appellant Knight had disclaimed any interest in the narcotics traffic (Tr. 472-473, 490-492). She also admitted that in October, 1955, Feldman had discussed with her the "deal he had put over with Mr. Garcia" and whether she had heard that Messrs. Knight and Ferrari were involved (Tr. 475-477).

Miss Hagler stated that Charles Garcia came frequently to the new restaurant she had opened, to give advice on the menu (Tr. 480-481, 502). After the restaurant was open for business, appellant Knight was an employee of Miss Hagler (Tr. 477-482, 487).

John Knight had known Ferrari since the middle thirties, and sometimes relieved him as bartender at *Ciro's* (Tr. 505, 534). He met Feldman at *Ciro's Bar*, and about two days later, about 4:00 a.m., went to Feldman's apartment with Miss Hagler (Tr. 505-508, 515). In the apartment kitchen Feldman spoke to him about investing his money in "junk" and Knight told him he didn't know what he was talking about (Tr. 516). Later in the living room Feldman again mentioned that he wanted to invest in "junk" and Knight said he didn't want to get involved in anything like that or associate with Feldman if that was his business (Tr. 519-520). Knight saw Feldman on numerous occasions thereafter at *Ciro's* (Tr. 521) and at Miss Hagler's restaurant (Tr. 525).

Appellant Knight admitted knowing Charles Garcia, and having been in his home on numerous occasions, but denied any conversation relating to narcotics (Tr. 526).

He also admitted having been convicted of a felony of concealing and facilitating the concealment of heroin in 1947 in violation of the Jones-Miller Act (Tr. 530-531). He was addicted to the use of narcotics for about 10 years (Tr. 531-532).

THE REBUTTAL.

Gloria Davis, a "call girl" and dope user, testified in rebuttal that she had known appellant Ferrari for about two years (Tr. 606-608, 617). About six months after meeting Ferrari she began purchasing heroin from him at *Ciro's* bar, in quantities of a "spoon," for which she paid \$40.00 (Tr. 609-610, 613). The heroin was received directly from appellant Ferrari after a prior telephone call to ascertain if a supply was available. The code used was "I want to do the thing" (Tr. 610-611).

Appellant Ferrari passed the narcotics to Miss Davis by slipping it under a napkin on which a drink was placed at the rear of the bar (Tr. 615-616). On one occasion appellant Ferrari made Miss Davis a Christmas gift of a spoon of heroin (Tr. 616-617).

On rebuttal, appellant Ferrari denied knowing Miss Davis, and denied having sold her narcotics, having seen her, or having talked to her (Tr. 653-654).

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix.

SUMMARY OF ARGUMENT.**I. THE EVIDENCE ADDUCED BY THE GOVERNMENT WAS MANIFESTLY SUFFICIENT TO SUPPORT THE VERDICT OF GUILTY AS TO APPELLANTS FERRARI AND DARNEILLE.**

What appellants ask is that this court reweigh the evidence and accept as true their own version of the facts, without regard to their credibility. It is well settled that this court will review the evidence in the record in the light most favorable to the government, and so viewed, the evidence is overwhelming.

II. APPELLANTS FERRARI AND DARNEILLE HAVE FAILED TO PRESENT A PROPER RECORD TO ESTABLISH THE EXISTENCE OF PREJUDICIAL NEWSPAPER PUBLICITY.

There is no showing that any juror read the newspaper articles complained of, or that any juror was influenced thereby. Moreover, the jury was adequately instructed to ignore any newspaper publicity and appellants failed to except to the sufficiency of the instruction or to pose instructions of their own.

III. THE REBUTTAL TESTIMONY OF GLORIA DAVIS WAS PROPERLY ADMITTED TO IMPEACH THE CREDIBILITY OF APPELLANT FERRARI.

Appellant Ferrari opened the door on direct examination by denying having had in his possession and having seen narcotics within the past year and a half.

The rebuttal testimony that Gloria Davis had purchased narcotics from Ferrari within that period of time was admissible to impeach appellant's testimony, and the jury was properly instructed that it was admitted for that sole purpose.

IV. THE GOVERNMENT WAS UNDER NO OBLIGATION TO LOCATE JANET JONES AS A WITNESS FOR APPELLANT DARNEILLE.

There is no showing that the government knew of her whereabouts; that she could have testified to relevant or material matters, or that she was not equally available to the appellant as to the government.

V. AN INSTRUCTION TO THE EFFECT THAT THE JURY MIGHT DRAW AN INFERENCE FROM THE FAILURE TO PRODUCE STRONGER EVIDENCE WAS CORRECTLY REFUSED.

The evidence was not available; its absence was explained; and it would have been merely cumulative of evidence presented. Moreover, appellants have failed to comply with Rule 18 (2) (d) of this court in their briefs.

VI. (a) THE COURT'S RESPONSE TO A QUESTION PRESENTED BY THE JURY WAS PROPER, DESPITE THE ABSENCE OF COUNSEL FOR APPELLANTS CHERPAKOV AND DARNEILLE.

Appellants were tried together in one proceeding and the presence of counsel for appellant Ferrari, by selection of co-counsel, constituted notice and oppor-

tunity for presence of all counsel. They knew immediately of the nature of the jury's inquiry and of the court's response. Although opportunity existed to take exception, they failed to do so until days after the verdict.

**(b) THE COURT'S RESPONSE TO THE JURY WAS A
CORRECT STATEMENT OF THE LAW.**

He informed the jury that the evidence was not available and not in evidence, and therefore they could not have it. To have instructed them on its admissibility in the event of its availability would have required a ruling upon a supposed or hypothetical state of facts. Abstract instructions, not based on the evidence of the case, would have been improper.

ARGUMENT.

I.

**THE EVIDENCE WAS AMPLY SUFFICIENT TO SUPPORT THE
VERDICT AS TO EACH APPELLANT.**

Appellants Ferrari and Darneille contend that the evidence was insufficient to support the verdict of guilty as to them (Ferrari Br., pp. 7-10; Darneille Br., pp. 4-5). Appellee Cherpakov makes no such claim.

Appellant Ferrari was charged and convicted only of the offense of conspiring to violate the narcotics laws in count 16 of the indictment, and appellant Darneille was convicted of the substantive offense of violation of the Harrison Narcotic Act in count one, and

of conspiracy to violate the Harrison Narcotic Act and the Jones-Miller Act, as charged in count 16 (Tr. 3-16, 41-44). He was acquitted of the offense of violation of the Jones-Miller Act charged in count 2 of the indictment (Tr. 41).

Motions for judgment of acquittal were made on behalf of each appellant at the close of the Government's case in chief (Tr. 241-243), and again at the close of all the evidence in the case (Tr. 665), and were denied.

It is a well established principle that this court will indulge in all reasonable presumptions in support of the ruling of the trial court, and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th);

Bell v. United States, 185 F. 2d 302, 308 (C.A. 4th);

Gendelman v. United States, 191 F. 2d 993 (C.A. 9th);

Barcott v. United States, 169 F. 2d 929, 931 (C.A. 9th) cert. denied 336 U.S. 912.

The proof in a criminal case need not exclude all possible doubt, but need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt.

Henderson v. United States, 143 F. 2d 681 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th).

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue. Wigmore on Evidence (3d ed. 1940), Vol. IX, Sec. 2497, p. 324.

An appellate court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial court.

Gage v. United States, 167 F.2d 122, 124 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F.2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254;

Gendelman v. United States, 191 F.2d 993 (C.A. 9th);

C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 491 (C.A. 9th).

Despite these well settled principles of appellate review, the statements of facts and the arguments of appellants are little more than fragmentary extracts of the evidence as it applied to them individually. Appellants completely ignore the facts that the object of the conspiracy was consummated by the sale of over 13 ounces of narcotics by the co-defendants Charles Garcia, Sr. and Charles Clarence Garcia, who pleaded guilty to the conspiracy charges; and by various subsequent sales of lesser amounts of narcotics.

In most cases, the proof of the agreement is the evidence of what the conspirators did in execution of such agreement.

Culp v. United States, 131 F.2d 93 (C.A. 8th);

Devoe v. United States, 103 F.2d 584 (C.A. 8th)

certiorari denied 308 U.S. 571;

Jelke v. United States, 255 Fed. 264 (C.A. 7th).

The evidence here clearly demonstrated the concert of action and community of purpose of the various conspirators. They were well acquainted with each other by their own admissions; they were intimately familiar with the narcotics traffic, having been without exception either users of narcotics or convicted peddlers; they admitted having discussed narcotics with Feldman, although they cast the conversations in a different and more innocent mold; there was ample evidence that each was aware of the discussions had by others with Feldman concerning narcotics, when they were not personally present; and they were aware when Feldman finally "scored."

The chain of circumstances began with the conversation between Feldman and Ferrari at Ciro's bar, when Feldman introduced himself as an "investment broker" who bought and sold small things he could carry in his pocket. Ferrari knew what Feldman wanted, although the words used to refer to narcotics were not actually expressed.⁵ At Ferrari's instructions, Knight visited Feldman's apartment and determined that Feldman was in the market for "white," a slang expression for heroin (Tr. 24-33).

Two weeks later Ferrari introduced Feldman to appellant Darneille who also visited Feldman's apartment, and told him that they wouldn't deal in anything less than a pound, and mostly kilos (Tr. 38). This was the same language used by Charles Garcia on the occasion of his first visit to the apartment (Tr. 55-56). Darneille knew of the previous night's discussion with appellant Knight at which Knight had agreed to contact Feldman the next day concerning a proposed deal (Tr. 38-39). On various occasions thereafter, Knight assured Feldman that "Bones" [Darneille] still wanted to make a deal (Tr. 42).⁶

Darneille and Feldman had further discussions on July 26, 27, 28 and 29, at which times the proposed

⁵Ferrari first testified that this conversation was the usual conversation a bartender has with a customer, but later that Feldman had specifically told him he wished to invest in narcotics (Tr. 344-346; 347-348; 379-381).

⁶In the light of the past experience of the conspirators in the narcotics traffic, it may be assumed that appellant Ferrari's purpose in sending them to Feldman's apartment was to provide an opportunity to observe him and determine if he was a bona fide purchaser or a federal or state agent.

deal was discussed, and finally on July 31, 1955 Darneille directed Feldman to Charles Garcia to "get the junk" (Tr. 43-53). During the course of these conversations, particularly on July 27, 1955, appellant Cherpakov entered into the arrangements, in company with Darneille, and requested a reference from Feldman (Tr. 49). He assured Feldman that he (Feldman) was "scoring already" despite having been in town less than a month, and that Feldman couldn't get any bigger than Red Ferrari, but that "if you do wrong by Red, you will end up in an alley" (Tr. 47). Feldman had met Cherpakov for the first time on the evening of this conversation (Tr. 46) and there is nothing in the record to show that he had reason to know from Feldman how long he had been in town; that Feldman was acquainted with Ferrari, or that Feldman had discussed narcotics with any of the other members of the conspiracy.

Ferrari's familiarity with the negotiations was further established when, on July 28, 1955, after Feldman had further conversation with Darneille and Cherpakov concerning the "deal," Ferrari asked if he was going to do business with them (Tr. 51).

On August 3, 1955, the day following the payment of \$6400 to the Garcias, Ferrari caused his attorney to write a letter to the Bureau of Narcotics (Ex. 8) reporting Feldman's apparent connection with the narcotics traffic. Although requested the following day to inform the agents of the Bureau of Narcotics if Feldman returned to Ciro's, Ferrari admitted that he had not done so, despite Feldman's visit a few hours

later that evening (Tr. 217-225, 391-396). To the contrary, he warned Feldman that the federal agents were looking for him (Tr. 394).

Inasmuch as Janet Howard, or Janet Jones, had allegedly informed Cherpakov and Darneille that Feldman was an agent, the probable purpose of this letter was either to ascertain the truth of that information or to prepare an alibi in the event Ferrari was later charged in connection with the conspiracy then too far under way to withdraw from (Tr. 288-289). Feldman testified that the last day Miss Howard was in the employ of the Bureau of Narcotics was August 1, 1955 (Tr. 168). Appellant Darneille's testimony was that the conversation with Miss Howard was August 10, 1955 (Tr. 285), but this conflicts with his later comment that it occurred on the day she had moved out of the apartment (which was fixed at August 1, 1955) (Tr. 288, line 9).

Furthermore, Ferrari admitted knowledge of the conspiracy on August 17, 1955 in a conversation with Feldman which is only partially set forth in appellant's brief (Br., p. 6). The omitted portion of that conversation is most incriminating. In full Ferrari said, "Look, Ike, I know what you are doing. I know who you are dealing with. I don't know about your deals. I can't go out with you. Like I told you once before, I don't want no trouble, and we aren't going to have any trouble" (Tr. 75).

Feldman had been under the impression that appellant Darneille (known to him only as "Bones") was "Bones" Remmer, and after learning of this error he

first mentioned it on August 2, 1955 to the Garcias at the time he paid over the \$6400 (Tr. 74-75, 110-112). Feldman did not mention the misunderstanding to anyone thereafter, but on August 17 the subject was raised by Ferrari who said he was sorry about the misunderstanding; that "Bones" would be in later, and they could straighten it out (Tr. 73-75). The clear import of this testimony is that Ferrari was in contact with the Garcias subsequent to the receipt of the money for the sale of narcotics.

Likewise, although Feldman told only Charles Garcia, Sr. that the narcotics were of inferior quality, he was approached by Cherpakov and Darneille several days later, and they expressed regret that the "stuff" was no good (Tr. 71-73, 77).

Each of the appellants took the stand in his own defense, and each admitted substantially all of the meetings and conversations with agent Feldman, including the use of certain language quoted by Feldman, but each recounted his own version of the discussions and denied any agreements with Feldman or each other to violate the narcotic laws. At best, the defense testimony placed in issue the credibility of the witnesses. The jury had an opportunity to observe their demeanor on the stand; and to consider and weigh the substance of the testimony, with the result that they rejected the appellants' versions of the occurrences. It is not the function of this court to reweigh the evidence or reconsider the credibility of the witnesses. This court has stated the rule to be as follows:

“It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. *Curley v. U.S.*, 81 US App. D.C. 229, 160 F.2d 229, 230. In the cited case, Judge Prettyman pertinently observes:

‘If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case.’ 160 F.2d at page 233. See also *U.S. v. Perillo* (2d Cir.), 164 F.2d 645.”

Stopelli v. United States, 183 F.2d 391, 393.

Evidence of a conspiracy is, of course, to be considered as a whole — not piecemeal. *United States v. Valenti*, 134 F.2d 362, 365 (C.A. 2d). Taken as a whole, the evidence here established the existence of an unlawful agreement, the accomplished purpose of which was to traffic in narcotics in violation of the applicable statutes; it established the commission of numerous overt acts on the part of each member of the conspiracy in furtherance of the objects of the conspiracy; it establishes a common purpose and design and mutual understanding among the conspirators to deal in narcotics. In short, the evidence was sufficient to sustain the verdict.

II.

THERE WAS NO ABUSE OF DISCRETION IN DENIAL OF MOTIONS FOR A MISTRIAL ON GROUNDS OF ADVERSE NEWSPAPER PUBLICITY.

Appellants Ferrari and Darneille contend that they were denied a fair trial because of newspaper publicity (Ferrari Br., 10-14; Darneille Br., 5-6). With the exception of short excerpts (Tr. 604-605) there is nothing in the record before this court to support the accusations of prejudicial newspaper accounts or the more serious implied accusation of misconduct on the part of the prosecutor (Ferrari Br., pp. 13-14).

The argument of appellant Ferrari is only incidentally based upon the record; that of appellant Darneille has no foundation in the record whatsoever. Moreover, only appellant Ferrari moved for a mistrial on the ground of the alleged prejudicial publicity, the remaining four defendants remaining silent (Tr. 604-605). Nor did appellant request that the jury be examined on *voir dire* to determine if they had read the newspaper articles, and, if so, whether they had been prejudiced thereby.

Appellants blandly invite this court to accept their unsupported assertions of prejudice to establish reversible error. This is not enough. Appellants have the burden of showing prejudice from a juror's reading of an inflammatory newspaper article, even after it is established that the article came to the attention of the juror.

United States v. Carruthers, 152 F.2d 512, 518 (C.A. 7, 1945) cert. denied 327 U.S. 787.

Appellants have failed to establish in the case at bar that any juror even saw the articles, much less that they were prejudiced thereby.

Appellant Ferrari further complains that the effect of the articles upon the jury was not removed by any admonition to the jury during the course of the trial or prior to its commencement. The record of proceedings on *voir dire* during the selection of the jury is not before this court, and appellant goes outside the record in stating that no admonition was given prior to the commencement of the trial. However, in any event, failure to tell the jury not to read newspapers or listen to the radio is not grounds for reversal in the absence of proof that any member of the jury saw or heard the stories mentioned.

United States v. Griffin, 176 F.2d 727, 731
(C.A. 3, 1949).

As Mr. Justice Holmes said in *Holt v. United States*, 218 U.S. 245, 251:

“If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.”

The jury was correctly instructed to disregard any newspaper account, or radio or television publicity, and to try the case solely upon the evidence as it was presented in court (Tr. 700). Appellants did not complain of the instruction when given, in compliance with Rule 30, Federal Rules of Criminal Procedure, and submitted no alternative instruction.

A motion for a mistrial on grounds of inflammatory publicity is directed to the sound discretion of the trial court, and the burden is on the defendant to show an abuse of discretion and prejudice to him. *United States v. Carruthers*, supra. Having failed to support the burden, the motion was properly denied below.

The cases cited by appellant Ferrari are not dispositive of the issue. *Briggs v. United States*, 221 F. 2d 636 (C.A. 6, 1955) was decided on the lack of instruction to the jury to disregard newspaper articles; and *Marson v. United States*, 203 F.2d 904 (C.A. 6, 1953) related to examination of jurors on *voir dire* and to newspaper accounts characterizing the defendants as "notorious hoodlums," "holders of long police records" and referring to previous arrest of one for kidnapping. The court was there asked to interrogate jurors concerning the articles, but the record failed to show that he had done so.

Although counsel for appellant Ferrari has included what purport to be typewritten copies of objectionable newspaper stories as Appendix A, to his brief, he did not make them a part of the record of the court below, and they should be disregarded.⁷ In his brief, appellant Ferrari goes further outside the record to characterize the newspaper coverage of the trial as "big news" which was "screamed" with "little bits of color," from the arrest in February to the trial in

⁷Even if considered by the Court, it is obvious that they are not prejudicial to appellant Ferrari since they report only what was subsequently brought out during the trial of the case; and it is difficult to imagine how they might be prejudicial to appellant Darneille since he is not even mentioned therein.

April, 1956. Moreover, from a quotation in the San Francisco News article of April 28, 1956 that the testimony of Gloria Davis was termed “vital” to the government’s case, he infers that the prosecutor deliberately used “daily newspapers as a propaganda medium for the purpose of securing a conviction based upon prejudice” (Br. 12, line 6 and page 14, lines 17-19).

Appellee need not depart from the record to demonstrate the fallacy of this inference. The quotation attributed to the prosecutor was not his, but the trial judge’s (Tr. 595-596):

“The Court. Mr. Lockley, I am willing to grant you a continuance if, as I apprehend, the testimony of your witness is vital to the case—is it?

Mr. Lockley. I think it is, Your Honor.”

Inasmuch as the colloquy took place in the presence of the jury it is unlikely that its subsequent publication would tend to prejudice the appellants, even assuming the article came to the attention of a juror.

III.

THE TESTIMONY OF THE WITNESS GLORIA DAVIS WAS PROPERLY ADMITTED TO IMPEACH APPELLANT FERRARI.

Appellant Ferrari complains that the testimony of Gloria Davis was improperly admitted, over objection, as impeachment on a collateral issue.⁸

⁸Appellant has failed to comply with Rule 18(2)(d) of this court requiring his specification of error to quote the grounds

Appellant poses, but does not press, several grounds upon which he suggests the testimony of the witness might be attacked (Ferrari Br. 15). The thrust of his argument appears, however, to be that it constitutes impeachment on a collateral issue and not proper rebuttal (Br. 16). He mistakenly states that the issue of whether appellant Ferrari had ever sold any narcotics "was raised for the first time on cross-examination, apparently for the purpose of impeachment" (Ferrari Br. 15; Tr. 387). This is not the case. Appellant opened up the subject on direct examination, when the last question put to him by his counsel was (Tr. 373):

"Q. Have you had in your possession or have you seen within the last year, year and a half, Mr. Ferrari, any narcotics whatsoever?

A. None whatsoever."

On cross-examination appellant Ferrari denied having purchased narcotics; having sold narcotics; and admitted he had transported narcotics, but "didn't know it was there" (Tr. 387-388).

In rebuttal, the witness Gloria Davis testified that during the past year and a half she had purchased and received from Ferrari's own hand a quantity of

urged at the trial for the objection to admission of evidence, and the full substance of the evidence admitted, with reference to the page number in the transcript where the same may be found. The court is not, therefore, required to consider this specification. *Lee v. United States*, No. 15,039, decided October 24, 1956 (C.C.A. 9); citing *Ziegler v. United States*, 9 Cir. 174 F.2d 439; *Mosca v. United States*, 9th Cir. 174 F.2d 448; *DuVerney v. United States*, 9 Cir. 181 F.2d 853; *Lii v. United States*, 9 Cir., 198 F.2d 109; *Cly v. United States*, 9 Cir. 201 F.2d 806; *Gordon v. United States*, 9 Cir. 202 F.2d 596.

heroin on various occasions (Tr. 609-617), thus contradicting his testimony and placing his credibility in issue.

Appellant relies on *Stansbury v. United States*, 219 F.2d 165 (C.A. 5, 1955), a prosecution for violation of the Marihuana Tax Act. The objectionable collateral matters used to impeach appellant in the cited case related to whether he had fathered an illegitimate child; had taken out a federal wagering stamp and had engaged in a policy wheel, and were clearly immaterial to the issues of the case. The court distinguishes the case from *Walder v. United States*, 347 U.S. 62 which is clearly controlling here.

In the *Walder* case the petitioner testified on direct examination that he had never sold narcotics to anyone in his life; nor had them in his possession; nor handed or given them to anyone; or acted as a conduit in passing narcotics from one person to another. He repeated the assertions on cross-examination, and the government called as a rebuttal witness one of its agents who had participated in an unlawful search and seizure during which narcotics were taken from petitioner's home and presence two years before. The jury was instructed that the evidence was admitted solely for the purpose of impeaching the defendant's credibility.

The sole question before the Supreme Court was whether the defendant's assertion on direct examination that he had never possessed narcotics opened the door, solely for the purpose of attacking his credibility, to evidence of the heroin unlawfully seized and

previously suppressed as evidence. The judgment was affirmed.

In the language of Justice Frankfurter:

“Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore, not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government’s disability to challenge his credibility” (at p. 65).

Likewise, the court below carefully instructed the jury on the purpose of the admission of Gloria Davis’ testimony as follows:

“You are instructed that the testimony of Gloria Davis does not relate to the guilt or innocence of any of the defendants.

“Mrs. Davis’ testimony was admitted for one purpose, and one purpose only, that is, to impeach the testimony of the defendant Ferrari and the only effect that such testimony can have is to assist you in determining the credibility of the defendant Renaldo Ferrari.” (Tr. 692.)

See also *Dowling Bros. Distilling Co. v. United States*, 153 F.2d 353 (C.A. 6th) where a defendant had testi-

fied on cross-examination that he had never sold any whiskey over ceiling price. The court held it was proper for the government to offer testimony as to overpayment made to defendant under circumstances similar to those charged in the indictment, because it went to his credibility.

IV.

APPELLANT DARNEILLE WAS NOT DENIED THE RIGHT TO SUBPOENA WITNESSES.

Janet Jones or Janet Howard, a special employee of the Bureau of Narcotics, was assigned to accompany agent Feldman during his investigation and give him "color" (Tr. 154-159). At the time of the trial agent Feldman had not seen her for six months, and did not know her whereabouts (Tr. 102, 148-149). She ceased to assist the Bureau of Narcotics on August 1, 1955 (Tr. 168).

A subpoena was issued for Miss Jones to appear as a witness for the defense (Ex. A). Service of the subpoena was attempted by leaving a copy with George White, head of the Bureau of Narcotics in San Francisco.⁹ At that time the defense was informed that Mr. White had no idea of Miss Jones' whereabouts (Tr. 569-570). No showing was made of any further

⁹The record fails to show the tender of the fee for one day's attendance and mileage allowed by law pursuant to Rule 17(d) Federal Rules of Criminal Procedure.

attempts to locate and serve the witness, or that the government or its agents had knowledge of Miss Jones' whereabouts at the time of trial or for any period of time after she left the employ of the Bureau of Narcotics.

Appellant Darneille alleges that the government's failure to produce Miss Jones at the trial deprived him of his constitutional right to have compulsory process for producing witnesses in his favor (Darneille Br. 6).

Rule 17 (d) provides in part:

"Service of subpoena shall be made by delivering a copy thereof to the person named. . . ."

The rule is not complied with by delivery of the subpoena to a former employer, or acquaintance, or leaving a copy at the last place of employment or residence of the witness. There is no showing that the witness was not available if the appellant had searched for her, or that any search was, in fact, made.

Moreover, there is no showing that the testimony of the witness was either material or necessary. Appellee assumes that she would have testified favorably to him concerning the substance of conversations had in her presence relating to narcotics. If so, the testimony would have been merely cumulative, for appellee testified to his version of the same conversations.

Appellee has found no reported cases in which it has been held that the government is under any obligation to search for and produce witnesses, absent a showing that the witness was made unavailable at the trial

through the suggestion, procurement, act or negligence of the government. Cf. *Motes v. United States*, 178 U.S. 458, 471; *Dear Check Quong v. United States*, 160 F.2d 251 (C.A.D.C. 1947).

To the contrary,

“Appellant must plead and prove his own case and is responsible for the production in court of witnesses necessary to do so.”

Thomas v. United States, 158 F.2d 97 (C.A. D.C.), certiorari denied 331 U.S. 882.

“We know of no rule which holds it error for the government to fail to put on the stand a witness, not deemed necessary to its case, who might conceivably have given testimony favorable to the defendant. It is for the defendant to make his own defense.”

Deaver v. United States, 155 F.2d 740 (C.A. D.C.) certiorari denied, 329 U.S. 766.

V.

THE COURT'S INSTRUCTIONS WERE COMPLETE AND CORRECT.

Appellants severally complain of the refusal of the court to give an instruction to the effect that upon failure of a party to produce stronger or more satisfactory evidence available to it, the jury might infer that such evidence would be adverse to that party (Ferrari Br. 19-22), (Cherpakov Br. 7-8) (Darneille Br. pages 1-2 to Appendix A).

The record fails to show that appellant Darneille submitted any proposed instructions, and in any event he failed to object to the instructions given.

Rule 30 Federal Rules of Criminal Procedure; Bateman v. United States, 212 F.2d 61 (C.A. 9th, 1954);

Herzog v. United States, 226 F.2d 561, rehearing 235 F.2d 665, certiorari denied.

Appellant Ferrari objected to the failure to give his requested instructions Nos. 9 and 12, but failed to state any ground for the objection (Tr. 694-695). He does not set forth in his brief the language of the rejected instructions in compliance with Rule 18 (2) (d) of this court (Ferrari Br. 19-22) and they are not to be found in the record on appeal.¹⁰

Appellant Cherpakov sets forth in his brief the language of the instruction proposed by him and rejected by the court (Cherpakov Br. 7). He does not set out the grounds of the objection urged at the trial, nor did he state any grounds at the time of his objection (Tr. 694-695).

Appellant Cherpakov relates his requested instruction to the failure to produce certain recordings made of conversations in Feldman's apartment by means of electronic devices consisting of microphones concealed

¹⁰In part, Rule 18(2)(d) of this court provides: "When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial." See *Benatar v. United States*, 209 F.2d 734 (CA 9th), *Bateman v. United States*, 212 F.2d 61 (CA 9th), *D'Aquino v. United States*, 192 F.2d 338, 356 (C.A. 9th).

in the apartment, and recording equipment in a nearby room (Cherpakov Br. 7-8). Appellant Ferrari relates his requested instructions to the failure of the prosecution to produce both the recordings of the conversations, and the witness Janet Jones (Ferrari Br. 19-22).

It has already been demonstrated (Point IV, *supra*) that the witness Janet Jones was not available to the government; that her whereabouts were not known; and that she was equally available to the defense as to the prosecution. Moreover, the record fails to disclose that she could have shed any light upon conversations with appellant Ferrari or that she had any knowledge concerning his participation in the conspiracy. She received no instructions except to accompany Agent Feldman, and she did not need to know what he wanted or what he was looking for (Tr. 159). Had she been called as a witness there is nothing to show that she had testimony of relevant or material matters concerning appellant Ferrari.

Testimony of agent Feldman that the apartment was equipped with listening and recording devices was first brought out in cross-examination (Tr. 90, 160-163, 183, 187, 200-201). No demands were made by the appellants for the production of the recordings. On redirect examination Agent Feldman testified that the recordings were taken each morning to his office and there used by the agents to make their official daily reports. The recordings were then reused, and in so doing the old conversation was erased and the new conversation recorded (Tr. 206-207). Testimony of

narcotics agent Wu that he had overheard conversations in the apartment by means of the listening devices was objected to, and excluded by the court (Tr. 207-213).

The unfavorable inference from non-production of evidence arises only if it is within the power of the person against whom the inference arises to produce the evidence. This is mentioned or assumed in almost all the cases. *Wigmore Evidence, Vol. II, 3rd Ed., Sec. 286*. In any event, the party affected by the inference may, of course, explain it away by showing circumstances which would otherwise account for his failure to produce. *Wigmore, supra, Sec. 290 (3)*. Finally, the inference can arise only where the evidence was such that it could have been used if produced; and it is obvious that the inference is not available for non-production or spoliation where the evidence would have been inadmissible or unnecessary or useless. *Wigmore, supra, Sec. 291 (4)*.

This court in *Remmer v. United States*, 205 F.2d 277¹¹ held that in a situation where the government had custody of books and records of defendant, but failed to introduce all of them in evidence, the defendant was not entitled to an instruction as to a possible inference to be drawn from such failure to produce. And a similar instruction given in *Moyer v. United States*, 78 F.2d 624 (C.A. 9th, 1935) was held prejudicial error in the circumstances of that case.

¹¹Vacated 347 U.S. 227, rehearing granted 348 U.S. 904, reaffirmed 222 F.2d 720, remanded for new trial 350 U.S. 377.

The situation here is closely parallel to that in *United States v. LaRocca*, 224 F.2d 859 (C.A. 2d 1955) wherein the defendant, on trial on narcotics charges, requested an instruction that the failure of the government to call as a witness a party who had aided in establishing contact between the defendant and arresting officers would justify an inference that his testimony would have been unfavorable to the prosecution. The court held that the request was properly denied.

Likewise, in *United States v. Antonelli Fireworks Company*, 155 F.2d 631 (C.A. 2, 1946) certiorari denied 329 U.S. 742, the rejection of a charge that the jury might draw an inference against the United States for its failure to call witnesses under subpoena by it was held proper. The court pointed out that the testimony would have been merely cumulative, as would the recordings be cumulative of the testimony of the witness Feldman in the case at bar. Moreover, the defense had laid a foundation for the claim that the witnesses in the *Antonelli Fireworks Company* case were not equally available to it because of alleged intimidation by FBI agents.

See also

Dear Check Quong v. United States, 160 F.2d 251, 253 (C.A.D.C. 1947).

The fact that the recordings were erased when the tapes were reused does not lend support to the appellant's claim that the prosecution wilfully, knowingly, and purposely caused their destruction and suppres-

sion. This was Agent Feldman's first narcotics investigation (Tr. 171). The investigation extended over a period of approximately eight months (Tr. 151). While it may be argued that the better choice would have been to preserve the recordings made during the whole period of time, the fact of their unavailability under the circumstances explained away any presumption or inference which appellants seek to draw. Evidence is sometimes lost through mischance, accident, mistake or even neglect, but mere unavailability alone does not provide the opposing party with the weapon of unfavorable inference. In *Woolard v. District of Columbia*, 62 Atl. 2d 680, a prosecution for drunken driving, a witness testified that a urinalysis test had been made, but did not testify as to the result thereof. Evidence was then adduced that the specimen of urine had been lost. The court held that it was proper to decline an instruction as to the failure to produce what was not available. The identical principle controls here.

The court properly rejected the proposed instructions on the showing that it was impossible to produce the recordings; that the failure to produce had been explained away by the prosecution; and that the evidence would have been merely cumulative of testimony already in the record.

Cases cited by appellant Cherpakov are distinguishable. *Morei v. United States*, 127 F.2d 827, does not relate to instructions. Moreover, the failure to produce evidence in that case went unexplained. *U. S. Fidelity and Guaranty Co. v. Leong Dung Dye*, 52 F.2d 567

(C.A. 9th) appears to have no relevancy to the point in issue. *Hodgskin v. United States*, 279 F. 85 (C.A. 2) and *United States v. Dunne*, 99 F. Supp. 196 (E.D. Pa.) relate to the admissibility of evidence of destruction of records as showing a consciousness of guilt, but they do not discuss instructions of the nature here in issue. *United States v. Walker*, 152 F.2d 612 adverts to the failure of the party to explain the non-production of evidence available to him.

VI.

THE COURT'S RESPONSE TO A QUESTION PRESENTED BY THE JURY WAS PROPER.

Appellant Cherpakov in his "Appellant's Contentions" I and III (Cherpakov Br. 2, 6-7, 8-10) complains that the trial judge improperly communicated with the jury without notice to counsel and outside the presence of the defendant, and that the supplementary instruction thus communicated was erroneous. Appellant Darneille raises the same questions in his "Argument of Points Raised on Appeal" Nos. 3 and 4 (Darneille Br. 6 et seq.). Both questions will be dealt with under this heading.

(a) Appellants' initial contention appears to be that the court's written communication to the jury, in response to a note, deprived them of due process of law because given without notice to counsel and without affording an opportunity to be present.

The only record before this court consists of a stipulation augmenting record on appeal entered into

between counsel for appellants Ferrari and Cherpakov and the government, unless the affidavits filed by appellant Cherpakov in connection with his motion for a new trial are considered to be a proper part of the record (R. 45-49, 56-57)¹²

Assuming, arguendo, that the affidavits correctly set forth the occurrence, it is clear that each counsel was immediately informed of the communications and was not deprived of an opportunity to except to the instruction immediately thereafter if he had cared to do so. Counsel admits that on May 2, 1956 he was present immediately outside the courtroom; that he and associate counsel agreed that Harry P. Glassman, attorney for appellant Ferrari, would appear for all defendants; and that he was immediately informed by attorney Glassman of the nature of the jury's inquiry and of the court's response. (R. 46). Counsel took no exception to the instruction of the court as required by Rule 30, Federal Rules of Criminal Procedure, unless his motion for a new trial made six days later on May 8, 1956, after the verdict had been returned, may be construed as a timely exception (R. 58). Although attorney Glassman's affidavit is to the effect

¹²Appellants, with the exception of appellant Ferrari, have failed to designate any portion of the record below; notwithstanding which the clerk has included the motion and affidavits of appellant Cherpakov for a new trial. Nothing further in connection with the alleged occurrence in chambers is before this court, and appellee filed no counter designation of the record for the reason that it was never served with a copy of appellant's designation. If this court sees fit to rely upon the affidavits thus presented, it should be noted that affidavits, even uncontroverted, are not proof of the facts. *Glasser v. United States*, 315 U.S. 60; *Holmgren v. United States*, 217 U.S. 509, 521.

that the court's response was "over affiant's objections," it is not indicated what was the ground for the objections, nor does the record further disclose the proceedings in chambers.

The five defendants on trial were presented by five separate counsel; the record discloses that it was not uncommon for one counsel to speak for all defendants where their interests were mutually involved.¹³ It is clear that appellant Cherpakov was represented by attorney Glassman in connection with the proceedings in chambers, and that there was no conflict of interest which would have prevented attorney Glassman from acting on behalf of all defendants. It is not unreasonable to assume that the court likewise was misled into the belief that all appellants were represented in the person of attorney Glassman, and there is no allegation that the court was informed otherwise. Undoubtedly, had counsel indicated that he was not representing all defendants the court would have called them into chambers. Like the record, appellant was silent until the motion for a new trial for the first time called to the court's attention the contention that he had been deprived of due process.

The situation here is distinguishable from that in *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, upon which appellant relies. The communication involved there was made without any notice to any counsel, and moreover, it was an incorrect charge. Further, appel-

¹³For example, all appellants now rely on the affidavits submitted only by appellant Cherpakov in the motion for a new trial.

lant excepted at the first opportunity to the charge given. Appellant here concededly had notice and opportunity and did not except until five days after the guilty verdict had been returned. Having invited the alleged error he has thereby waived the right to complain.

Shields v. United States, 273 U.S. 583, is likewise different on its facts. Counsel there was not informed of the communication between court and jury and had no knowledge of it until two months later. This is clearly distinguishable from the case at bar where appellant concedes he was informed immediately of the communications and took no steps to object to the manner of substances of the reply.

If the jury had been recalled and the charge read to them in appellant's presence, no different result can be supposed. Not every communication in the constrained absence of the accused necessarily requires a new trial. *Outlaw v. United States*, 81 F. 2d 805, 809 (CA 3rd 1936).

In *United States v. Compagna*, 146 F. 2d 524 (CA 2d, 1944) the trial judge stopped in the jury room to inquire as to what they meant by a note addressed to him. In affirming the conviction, Judge Learned Hand said,

“But like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity (citing cases). There cannot be the slightest

doubt here that the informality—for, at most, it was no more—did not prejudice the accused.” (Page 528.)

There appears to have been no attempt to have evidence taken to determine the circumstances surrounding the giving of the supplemental instruction by the court at the time of the motion for a new trial. Appellants thus invite this court to speculate as to the facts, or to accept their version of the occurrence and the conclusions to be drawn. Even so, they have failed to show any prejudice resulting from the action of the trial judge, and by failure to make timely objection they have waived any claim of error.

(b) The supplemental instruction was a correct statement of the law.

The jury submitted the following note to the trial judge.

“The jury would like to know if it would be permissible (sic) to play government (sic) recordings in a court if they were available.”

The court replied:

“The records are unavailable. Furthermore, they are not in evidence. Therefore you may not have them.” (Stipulation augmenting record on appeal.)

As has been demonstrated, *supra*, there was ample testimony establishing the unavailability of the recordings and the circumstances of their erasure. The question of the jury was a hypothetical one, requiring the court to rule in a vacuum on the admissibility of

evidence it had no opportunity to inspect.¹⁴ Admissibility of the recordings could only have been determined after proper foundation had been laid and they had been sufficiently identified and their materiality, relevancy and competency shown.

It would, indeed, have been improper for the court to instruct the jury "upon a supposed or conjectural state of facts, of which no evidence has been offered."

United States v. Breitling, 20 How. 252, 254, 255, quoted with approval in *Quercia v. United States*, 289 U.S. 466, 471.

Refusal to instruct the jury that the testimony of an absent informer, had he been present and testified, should have been viewed with suspicion was held properly refused as an abstract instruction in *Dear Chuck Quong v. United States*, 160 F. 2d 251 (C.A.D.C. 1947).

The court's observation that the recordings were not available, and not in evidence, was obviously correct, and that it was adequate to satisfy the jury is demonstrated by the failure of the jury to request further enlightenment on the subject. It is Hornbook law, and the jury was instructed here, that they are to try the case solely upon the evidence presented in court (Tr. 700).

¹⁴Had the recordings been available it is fair to assume that appellants would have objected vigorously to their admission in evidence. It was not until after the government brought out in redirect examination of agent Feldman that the records had been erased that they assumed such importance in the defense arguments. On cross-examination of Feldman the appellants failed to pursue any line of question concerning the recordings or to ask for their production.

Bollenbach v. United States, 326 U.S. 607 is distinguishable on the ground that the instruction there given was characterized by the Supreme Court as "bad law."

CONCLUSION.

For the reasons stated, the judgments of conviction should be affirmed.

LLOYD H. BURKE,

United States Attorney,

JOHN LOCKLEY,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.



Appendix

STATUTES.

The applicable statutes read as follows:

Title 26 U.S.C. 2553(a)—Harrison Narcotic Act:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.”

Title 26 U.S.C. 2557(b)—Harrison Narcotic Act:

“Whoever commits an offense or conspires to commit an offense described in this subchapter, subchapter C of this chapter, or parts V or VI of subchapter A of chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than \$2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than \$2,000 and imprisoned not less than ten or more than twenty

years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this paragraph, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this paragraph or in section 2(c) of the Narcotic Drugs Import and Export Act, as amended (U.S.C.A., title 21, sec. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he ac-

knowledges that he is such person, he shall be sentenced as prescribed in this paragraph."

Title 21 U.S.C. 174—Jones-Miller Act:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than \$2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than \$2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section

171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney, whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

“Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

Title 18 U.S.C. 371—Conspiracy Statute:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy”, each shall be punished as provided by law.

No. 15289

United States
Court of Appeals
for the Ninth Circuit

CASH DIVIDEND CHECK CORPORATION,

Appellant,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
Doing Business Under the Fictitious Firm
Name and Style of CASH SAVING CHECK
CORPORATION and CASH SAVING
CHECK CORPORATION,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED
DEC - 3 1956



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Southern District
of California, Central Division

Civil Action No. 18765-HW

CASH DIVIDEND CHECK CORPORATION, a
Corporation,

Plaintiff,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
Doing Business Under the Fictitious Firm
Name and Style of CASH SAVING CHECK
CORPORATION, CASH SAVING CHECK
CORPORATION,

Defendants.

COMPLAINT FOR INFRINGEMENT OF REG-
ISTERED COPYRIGHT AND UNFAIR
COMPETITION

Now comes the plaintiff and for cause of action
against the defendants, and each of them, alleges
as follows:

I.

That the plaintiff is now and at all times alleged
herein was a corporation organized and existing
under and by virtue of the laws of the State of
Colorado, and having its principal place of business
in Denver, Colorado.

II.

That the defendants Leonard F. Davis and
Wayne Layton are residents of the Southern Dis-
trict of California, Central Division, Leonard F.
Davis residing in Long Beach, California, and

Wayne Layton residing in Lynwood, California; that the [2*] defendants are doing business under the fictitious firm name and style of Cash Saving Check Corporation at 3425 Firestone Boulevard, South Gate, California, within the Southern District of California, Central Division; that the acts of copyright infringement and unfair competition complained of herein were committed by said defendants, and each of them, within said District.

III.

The Court has jurisdiction of the subject matter and of the parties by virtue of §§1338(a) and (b), 1400(a) and of §1332(a)(1), of Title 28 United States Code.

IV.

That prior to February 10, 1934, W. V. Mathews, who then was a citizen of the United States and an employee of plaintiff corporation, created and wrote for said plaintiff corporation an original book entitled "Cash Dividend Check Pay to the Order of."

V.

That said book contains a large amount of material wholly original with the author and is copyrightable subject matter under the Copyright Laws of the United States.

VI.

That between February 10, 1934, and February 15, 1934, plaintiff compiled in all respects with the Copyright Act of March 4, 1909, as amended by

*Page numbering appearing at foot of page of original Certified Transcript of Record.

the Act approved March 2, 1913, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book and received from the Register of Copyrights a certificate of registration dated and identified as follows: "February 15, 1934, Class AA 139152."

VII.

That since February 15, 1934, said book has been published [3] by plaintiff and all copies of it made by plaintiff or under its authority or license have been printed, bound and licensed in strict conformity with the provisions of the Act of March 4, 1909, as amended by the Act approved March 2, 1913, and all other laws governing copyright.

VIII.

That since February 15, 1934, plaintiff has been and still is the sole proprietor of all right, title and interest in and to the copyright in said book and in and to the registration therefor and thereon.

IX.

That within six years last past and prior to the filing of this complaint, the defendants Leonard F. Davis and Wayne Layton have caused to be published and placed upon the market a book entitled "Cash Saving Check" which was copied largely from plaintiff's book "Cash Dividend Check Pay to the Order of"; that the Cash Saving Check Corporation placed said books upon the market and the defendants, Leonard F. Davis and Wayne Lay-

ton actively participated therein and have directed and controlled said operations; that the activities of said defendants, and each of them, constitute infringement of plaintiff's registered copyright and said defendants are jointly and severally liable for said infringement.

X.

That a photostatic copy of plaintiff's registered copyrighted book is attached hereto as Exhibit 1; that a photostatic copy of the infringing book published by defendants Leonard F. Davis and Wayne Layton, doing business under the name and style of Cash Saving Check Corporation is attached hereto as Exhibit 2; that a photostatic copy of the Certificate of Registration covering plaintiff's copyright is attached hereto as Exhibit 3. [4]

XI.

That said defendants are fully aware that the plaintiff and licensed distributors thereof are endeavoring to publish their copyright and to make use of the same within the same territory within which the defendants are conducting their activities; that said action of the defendants has caused great damage and injury to the plaintiff for which there is no adequate remedy at law; that said defendants have wilfully infringed upon the registered copyright of the plaintiff and with full knowledge of plaintiff's copyright and of its activities in utilizing said copyright in its money saving plan and have thereby aggravated said copyright infringement and unfairly competed with plaintiff.

Wherefore, plaintiff prays:

1. That the defendants, and each of them, their agents and servants, be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner and from publishing, selling, marketing or otherwise disposing of any copies of the copyrighted work entitled "Cash Dividend Check Pay to the Order of."

2. That defendants, and each of them, their agents and servants, be enjoined during the pendency of this action and permanently from the unfair practices and acts of unfair competition complained of.

3. That defendants, and each of them, be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and said unfair trade practices and said unfair competition and to account for:

(a) All gains, profits and advantages derived by [5] defendants, and each of them, by said unfair trade practices and unfair competition; and

(b) All gains, profits and advantages derived by defendants, and each of them, by their infringement of plaintiff's copyright, or such damages as to the Court shall appear proper within the provisions of the Copyright Statutes.

4. That defendants, and each of them, be required to deliver up to be impounded during the pendency of this action all copies of said copyrighted work, as exemplified by Exhibit 2 hereto, in their possession or under their control and to deliver up for destruction all infringing copies and all plates, molds and other matter for making such infringing copies.

5. That defendants, and each of them, pay to plaintiff the cost of this action and reasonable attorneys' fees to be allowed to the plaintiff by the Court.

6. That the judgment entered in favor of plaintiff be trebled because of the wilful nature of the copyright infringement.

7. That plaintiff have such other and further relief as is just.

Dated: This 16th day of September, 1955.

/s/ LEONARD J. LYON,

/s/ R. E. CAUGHEY,

Attorneys for Plaintiff. [6]

1952

CASH DIVIDEND CHECK CORPORATION

OF DENVER, COLORADO

Series 524,280

Upon proper presentation

Pay to the order of

THE INDIVIDUAL TO WHOM ISSUED MUST PLAINLY SIGN HIS OR HER NAME ON THIS LINE

ONE DOLLAR & No/100

\$1.00

DEPOSITORY
The Central Bank & Trust Co.
Denver, Colorado

CASH DIVIDEND CHECK CORPORATION



COPYRIGHT 1934, CASH DIVIDEND CHECK CORPORATION - DENVER, COLO. COPYRIGHT © AA 139 152

ENDORSEMENTS

The first endorsement below must agree with the signature on the face of check.

Authorized Dealer

The dealer issuing this check must stamp registered name and address of his firm in this space.

Proper Presentation

This CHECK is valid ONLY when 100 Cash Dividend Stamps are attached to spaces provided inside. Check may be cashed at any authorized dealer or your local bank.

VOID

Cash Dividend Checks are valid if not presented for redemption within two (2) years from January 2nd of the year printed on the face of check.

PUT ONE STAMP IN EACH SPACE

AUTHORIZED DEALERS

OLNEY, ILLINOIS

WELAND-GOUDY HARDWARE
Every Hardware Need
224 E. Main Phone 129

OLNEY FLOWER SHOP & GREENHOUSE

Say it with Flowers

301 E. Main Phone 1075
367 N. West Phone 131W

FERRENBACHER'S SERVICE STA.
Phillips 66 Products
629 W. Main Phone 766

ANDERSON'S GIFT SHOP

Gifts for all Occasions
114 Whittle Phone 974

QUAYLE'S IGA SUPER MARKET
Quality Groceries & Meats
401 N. East St. Phone 282W

EALLEY'S JEWELRY

First in Fine Jewelry
211 E. Main Phone 270R

TINY TOT SHOP
Supplies for Tot and Teenable
215 E. Main Phone 1051

VAN'S

Appliances - Sporting Goods
Electrical Supplies
204 E. Main Phone 320

ESQUIRE MEN'S SHOP

The Store for Men
222 E. Main Phone 11

BARNES 66 SERVICE STATION

Phillips 66 Products
501 Whittle Phone 233W

PUT ONE STAMP IN EACH SPACE

THE MONEY SAVINGS SYSTEM

This CHECK is worth \$1.00 in CASH to you when 100 CASH DIVIDEND STAMPS are attached to it. You may cash it at any store authorized to use this MONEY SAVINGS SYSTEM, or at your local Bank. You may obtain the Stamps at the rate of 2 for each dollar's worth of Purchases, and your local merchant who offers you this opportunity to save should be patronized. Remember, buying where you get CASH DIVIDEND CHECKS is like putting money into the Savings Bank. Ask your favorite merchants in all lines of business to install this MONEY SAVINGS SYSTEM so that you may obtain these savings on all your Cash purchases.

17 Stamps from all stores displaying the Cash Dividend Sign may be placed on this Check

CASH DIVIDEND CHECK CORPORATION
1622 Arapahoe St., Denver 2, Colo.

SHERMANS

Olney's Finest Dept. Store
202 E. Main Phone 134

OLNEY CLEANERS

Cleaning and Dyeing
410 E. Main Phone 484

LaRUTH SHOP

The Store for Women
Arcade Building Phone 183

BOWER'S DRUG STORE

Walgreen Agency
Walter Forney, Prop.
209 E. Main Phone 130



CASH SAVING CHECK

 NO. 1988
1222

Series 55

1955

Upon proper presentation

 PAY TO THE
ORDER OF

\$1.00

THE INDIVIDUAL TO WHOM ISSUED MUST PLAINLY SIGN HIS OR HER NAME ON THIS LINE

ONE DOLLAR & NO / 100

DEPOSITORY

CALIFORNIA TWENTY BRANCH

 90-1582
1222

Bank of America

NATIONAL EXCHANGE ASSOCIATION

 9937 CALIFORNIA AVENUE
SOUTH GATE, CALIFORNIA

CASH SAVING CHECK CORPORATION

Wm. Payton J. Davis

ENDORSEMENTS

The first endorsement below must agree with the signature on the face of check.

NAME

STREET

CITY

TELEPHONE

Authorized Dealer

DAVIS MARKET

 3450 FIRST ST. BLDG.
SOUTH GATE, CALIFORNIA

VOID

Cash Saving Checks are Void if not presented for payment within two (2) years from January 2nd of the year printed on the face of check.

Proper Presentation

This CHECK is valid ONLY when 100 Cash Saving Stamps are attached to spaces provided inside and the issuing dealer's name and address are placed herein by him.

PUT ONE STAMP IN EACH SPACE

PLACE 10 STAMPS ON THIS PAGE

You will receive One CASH SAVING STAMP for each 50¢ purchase at any of the merchants listed below. When 100 CASH SAVING STAMPS are attached to this check it will be worth \$1.00 in CASH. You may cash it at any merchant listed below or at the Bank. The money is held by the Bank of America of South Gate to guarantee each payment. When the check is filled, you can get CASH immediately.

Ray Retail Merchant wanting information on the Cash Saving Check Plan call MORRIS 9-460 or LO 7-1333

OK Baby Shop

 25% OFF ON BABY FURNITURE
WE BUY, SELL AND RENT
8644 State Street LO 7-4558 or LO 7-4279

Brad's Bike Shop

 POWER and HAND LAWNMOWERS and EDGERS
SALES and SERVICE
5937

Household Hardware & Paint Co.

 9 A.M. to 12 M.
LO 7-3155 8102 California Ave.

Buck's Union Oil Service

 3480 Franklin Blvd. at California
Phone LO 9-7841

LO 7-1448

Western Motor Rebuilders

 COMPLETE AUTO PARTS
Automotive Machine Shop 8126 State Street

Bill's Quality Meats

FEATURING BUCETTI BARY REEF

 We Cut and Package for Your Home Freezer
LO 9-6000 in Davis Market

Firestone Pottery & Gift Shop

 Over 40 Different Patterns in Dishes
Over 9,000 Items in Gifts
LO 7-3374 3400 Firestone Blvd.

Turnbull Bros. Paint Store

 Color Matching... Wall Paper in Stock... Paints
Lillian 7-4315 2833 South Avenue

Martin's Cleaning Plant

 BETTER CLEANERS SINCE 1927
LO 7-5444 2317 Liberty Blvd.

Parsons Pharmacy

 3440 So. State Street
LO 7-4812

Hours 10 to 8

Martin's

 RADIO CENTER
TV SERVICE 8415 State Street
George E. Martin

Layton Rents

 3425 Firestone Blvd. 1430 Atlantic Blvd.
LO 7-1353

OPEN UNTIL MIDNIGHT

Davis Market

 BIGGEST LITTLE SUPER MARKET IN TOWN
LO 9-6000 3400 Firestone Blvd.

PLACE 10 STAMPS ON THIS PAGE

PLACE 10 STAMPS ON THIS PAGE

THIS CHECK IS VALID ONLY WHEN 100 CASH SAVING STAMPS ARE ATTACHED TO SPACES PROVIDED INSIDE

Exhibit 3

Book Dividend Book Exposition
Henry. J. St.
 City of book: Book Dividend Book
Pay to the order of -
By H. H. Marshall

Author, of the United States.

Date of publication: Feb. 10, 1904 ADAMS received Feb. 15, 1904
Feb. 12, 1904 Entry: Class AA, No. 139152



W. H. Brown
 Acting Register of Copyrights

U.S. GOVERNMENT PRINTING OFFICE: 1904

AA

LIBRARY OF CONGRESS
 COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA
 WASHINGTON

CERTIFICATE OF COPYRIGHT REGISTRATION

This is to certify, in conformity with section 25 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 1, 1911, that TWO copies of the BOOK named herein have been deposited in this Office under the provisions of the Act of 1909, together with the AFFIDAVIT prescribed in section 10 thereof; and that registration of a claim to copyright for the first term of 28 years from the date of publication of said book has been duly made in the name of

(over)

Endorsed: Filed September 16, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come now, defendants Leonard F. Davis and Wayne Layton sued herein as Leonard F. Davis and Wayne Layton, doing business under the fictitious firm name and style of Cash Saving Check Corporation, and answering plaintiff's complaint, admit, deny and allege as follows:

I.

Defendants do not have any information upon which to form any belief concerning the allegations of paragraph I of plaintiff's complaint and upon that ground they deny each, every, and all of the allegations therein contained.

II.

Answering paragraph II, defendants admit that they are residents of the Southern District of California, Central [10] Division, and that Leonard F. Davis resides in Long Beach, California, and Wayne Layton resides in Lynwood, California. Except as herein specifically admitted, defendants deny each, every and all of the allegations of said paragraph II.

III.

Defendants do not have sufficient information to form any belief concerning the allegations of paragraphs IV, V, VI, VII, and VIII of the complaint. and upon that ground deny each, every, and all of the allegations therein contained.

IV.

Answering paragraph IX, defendants admit that the Cash Saving Check Corporation placed with merchants in the City of South Gate, California, cash saving checks and that defendants Leonard F. Davis and Wayne Layton participated in the said placement of cash saving checks. Except as herein specifically admitted, defendants deny generally and specifically, in the singular and in the conjunctive, each, every, and all of the allegations contained in said paragraph IX.

V.

Answering paragraph X, defendants admit that the cash saving check which was placed with merchants at South Gate, California, by the Cash Saving Check Corporation was for a short period of time, to wit, no more than two (2) months, in the form as set forth in plaintiff's complaint as Exhibit 2 thereof. Defendants do not have any information concerning the remainder of the allegations of said paragraph X, and upon that ground deny all thereof except that which they have herein specifically admitted.

VI.

Answering paragraph XI, defendants deny generally and specifically, in the singular and in the conjunctive, each, [11] every, and all of the allegations therein contained, and deny further that plaintiff has been damaged or injured in any manner by reason of the actions of these answering defendants. Further answering paragraph XI, de-

endants further allege that if defendants have infringed upon the copyright of plaintiff, the said infringement was not wilfull.

Wherefore, defendants pray that the complaint be dismissed, that they be awarded their costs, and for all proper relief.

Dated: This 24th day of January, 1956.

/s/ MILTON WILLIAM GORDON,
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed January 31, 1956. [12]

United States District Court, Southern District of
California, Central Division

Civil Action No. 18765-HW

CASH DIVIDEND CHECK CORPORATION, a
Corporation,

Plaintiff,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
Doing Business Under the Fictitious Firm
Name and Style of CASH SAVING CHECK
CORPORATION,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT

This cause came on for trial, and the Court having heard the evidence and considered the stipula-

tion of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact

I.

That the plaintiff is now and at all times alleged in the complaint was a corporation organized and existing under and by virtue of the laws of the State of Colorado, and having its principal place of business in Denver, Colorado.

II.

That the defendants are residents of the Southern District of California, Central Division; that defendants and the defendant Cash Saving Check Corporation are doing business at [14] 3425 Firestone Boulevard, South Gate, California, within the Southern District of California, Central Division.

III.

That the Court has jurisdiction of the subject matter and of the parties.

IV.

That prior to February 10, 1934, W. V. Mathews was the author of that certain work entitled "Cash Dividend Check Pay to the Order of" as exemplified by Exhibit 1 to the complaint filed herein; that said work was published on February 10, 1934, and bore thereon the notice of copyright required by Section 19 of Title 17 of the United States Code; that subsequent to publication the plaintiff made

application for copyright registration of said work and received a certificate of registration therefor issued by the Register of Copyrights on February 15, 1934; that the parties in open court stipulated to the issuance of said certificate of registration and that Exhibit 3 to the complaint is a photostatic copy thereof.

V.

That the work exemplified by plaintiff's Exhibit 1 to the complaint is not subject matter which can be covered by a statutory copyright pursuant to the provisions of Section 10 of Title 17 of the United States Code.

VI.

That subsequent to February 15, 1934, plaintiff has continued to publish the work exemplified by Exhibit 1 to the complaint and plaintiff is the sole proprietor of all of the right, title and interest in and to said work and in and to the purported copyright for which the Register of Copyrights issued the registration exemplified by plaintiff's Exhibit 3 to the complaint. [15]

VII.

That the defendants, Leonard F. Davis and Wayne Layton, doing business under the fictitious firm name and style of Cash Saving Check Corporation, and their successor in interest Cash Saving Check Corporation, a California corporation, have distributed a work entitled "Cash Saving Check" as exemplified by Exhibit 2 to the com-

plaint which was copied from the work of plaintiff as exemplified by Exhibit 1 to the complaint.

VIII.

That the photostatic copies attached to the complaint as Exhibits 1, 2, and 3 have been stipulated by the parties as true and correct copies of their originals and shall be considered with the same force and effect as the originals.

IX.

That the said action of defendants have not caused any damage or injury to plaintiff.

Dated: This 6th day of August, 1956.

/s/ HARRY C. WESTOVER,

United States District Judge.

Conclusions of Law

I.

That plaintiff's original writing of "Cash Dividend Check Pay to the Order of" is not copyrightable subject matter under copyright laws of the United States, and that plaintiff does not have the sole and exclusive rights or privileges to the publication thereof.

II.

That the complaint must be dismissed.

It Is So Ordered, and counsel for defendants will submit appropriate judgment in accordance herewith.

Dated: This 6th day of August, 1956.

/s/ HARRY C. WESTOVER,
United States District Judge.

Judgment

This cause having come on to be heard and the issues having been regularly brought on for trial before Honorable Harry C. Westover, Judge presiding, without a jury, the parties having appeared by their respective counsel and the issues having been duly tried, and having been considered by this Court upon the pleadings and evidence presented on trial and upon the briefs by counsel for the parties, and upon the findings of fact and conclusions of law set forth in the open file in this Court on the day of, 1956, it is

Ordered, Adjudged, and Decreed:

(1) That the work exemplified by Exhibit 1 to the complaint and relied upon by the plaintiff as a statutory copyright upon which registration has been secured, as exemplified by Exhibit 3 to the complaint is not a valid copyright under the provisions of Section 10 of Title 17 of the United States Code and under the copyright laws of the United States.

(2) That the complaint of plaintiff herein be dismissed on its merits.

Dated: This 6th day of August, 1956.

/s/ HARRY C. WESTOVER,
United States District Judge.

Approved as to form:

LYON & LYON,
By /s/ R. DOUGLAS LYON,
Attorneys for Plaintiff.

Lodged August 6, 1955.

[Endorsed]: Filed, docketed and entered August 6, 1956. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The plaintiff, Cash Dividend Check Corporation, in the above-entitled action, hereby appeals to the Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled action on August 6th, 1956, and from each and every part thereof.

LYON & LYON,
/s/ R. E. CAUGHEY,
Attorneys for Plaintiff-
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed August 7, 1956. [19]

[Title of District Court and Cause.]

ORDER

This cause having come before the Court to be heard upon the motion of Plaintiff-Appellant,

It Is Hereby Ordered:

That the time for the filing of the record on the appeal and docketing of the appeal taken in the above-entitled case be and hereby is extended from September 17, 1956, to and including October 17, 1956, which is less than ninety (90) days from date the Notice of Appeal was filed.

Dated September 14, 1956.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed September 14, 1956. [26]

In the United States District Court, Southern
District of California, Central Division

No. 18765-HW

CASH DIVIDEND CHECK CORPORATION,
Plaintiff,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
etc.,

Defendants.

Honorable Harry C. Westover, Judge Presiding:

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Thursday, June 7, 1956

Appearances:

For the Plaintiff:

LYON & LYON, by
R. E. CAUGHEY, ESQ.

For the Defendants:

MILTON WILLIAM GORDON, ESQ.

Thursday, June 7, 1956—10:00 A.M.

The Clerk: No. 18765-HW Civil, Cash Dividend Check Corporation vs. Leonard F. Davis, et al., trial.

Mr. Caughey: Ready for the plaintiff, your Honor.

Mr. Gordon: Ready for the defendant, your Honor.

The Court: You may proceed. I have read your pleadings and read your pretrial memorandum. You can go ahead. I think I know what the issues are in this case.

Mr. Caughey: Just a brief statement, your Honor?

The Court: All right.

Mr. Caughey: As your Honor knows from reading the pleadings and the memorandum, this is a copyright case under the Copyright Law of the United States. The particular copyright is under the

first section of Section 5, the first subdivision of Section 5, book classification.

This particular classification is, as your Honor probably knows, a catch-all classification in the Copyright Office where they put everything else that isn't covered by the succeeding classifications. So, therefore, although this is to be designated a book as far as the copyright laws are concerned, I think it might more properly be designated as an expression of intellectual effort, where you have an expression, because there are different things that are covered by that classification, such as accounting forms, various and sundry [3*] things which are, although generally classified as a book, are not what you would ordinarily classify as a book. However, they are expression of intellectual effort.

Now, when we consider a copyright, many of the cases state that originality is necessary. There are some cases to the effect that originality is not necessary insofar as certain——

The Court: Now, you are arguing the law in this case. Let's find out what the facts are.

Mr. Caughey: No, I am not arguing the law. I want to focus your Honor's attention to this fact. I want to make my point, that there is originality in this case. This is a case where we do have, not only originality, but we have, as the evidence will show, something that is actually new. Not only have we originality, therefore, but this is actually new, as the evidence will show, because this particular form

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

of what I will call basically a check, is something that had never been used before the particular purpose for which it was used.

The Court: Your statement is not evidence in this case. If you just call your witnesses and let the witnesses testify, we will find out about this case.

Mr. Caughey: All right, sir, if that is what you wish.

The Court: Call your first witness. [4]

Mr. Caughey: Mr. Gordon.

BERT GORDON

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Bert Gordon, G-o-r-d-o-n.

Direct Examination

By Mr. Caughey:

Q. Would you please state your name?

A. My name is Bert Gordon.

Q. Where do you reside?

A. I reside in Denver, Colorado.

Q. What association, if any, do you have with the plaintiff in this action?

A. I am the president of the Cash Dividend Check Corporation.

Q. How long have you been president of that corporation? A. Since 1952.

Q. Have you any other business, Mr. Gordon?

(Testimony of Bert Gordon.)

A. Yes.

Q. What is it?

A. I am the president of the Gordon Stores Co., Inc., [5]

Q. And that operates where?

A. We have a small chain of department stores in three states. There are 11 stores.

Q. In the West?

A. Colorado, Texas, and New Mexico.

Q. When did you become associated with the Cash Dividend Check Corporation, the plaintiff?

A. In 1951.

Q. Would you state the factors that caused you to become associated with that concern?

A. Perhaps I misinterpreted you. I became associated with the Cash Dividend Check Corporation as of February 1, 1952. I believe it was at the time that our group acquired control of the voting stock of the Cash Dividend Check Corporation.

Q. Had you had some contact with the corporation prior to that time? A. Yes.

Q. Would you state what that was?

A. In 1951, one of their representatives called at our office in Denver and presented this very unique and original, what we will call a stamp plan, and we were very much taken with its copyrighted cash dividend check. We saw certain features in it which we had never been exposed to before. We had investigated at times various stamp plans, but nothing ever appealed [6] to us such as this.

We tried it in our Leadville, Colorado, store first.

(Testimony of Bert Gordon.)

We had such an outstanding result with its usage that we checked into the company and found that it could be purchased, and then we arranged for the purchase of the outstanding stock of the company.

Q. You are using it in the stores since that time? Have you continued to use it? A. Yes.

Q. With success, Mr. Gordon?

A. Yes, sir.

Q. When you say success, what was the nature of the success? Did it increase the sales, or what?

A. In our first experience, we had over a 40 per cent increase in our volume within the first six months of its usage. Subsequent history has varied somewhat near that figure, I would say.

Q. As I understand you, this success in your own stores caused you to take over control, purchase control of the plaintiff corporation, is that correct?

A. Yes, sir.

Q. Since you and your group took control of the corporation in 1952, what, if anything, have you done insofar as the exploitation of the copyright here involved is concerned?

A. We have been spreading into various other states. [7] We are operating in California, Colorado, Montana, Texas, Oklahoma, Michigan, Illinois, Missouri, and so forth, in our process of national development.

Q. In what manner have you exploited this particular copyright? Have you licensed or franchised others, or just how have you carried on the business?

(Testimony of Bert Gordon.)

A. As a general principle, we have licensed distributors in various regions, geographical regions. Under this licensing arrangement they pay a royalty fee to us for the use of the copyright.

Q. Have you a distributor in Southern California, or licensee? A. Yes, sir.

Q. What is their name?

A. Their corporation is known as Check System, Incorporated.

Q. Who is the party who is the foremost man in that corporation, do you know?

A. Mr. Earl W. Beebe.

Q. Are they operating in Southern California?

A. Yes, sir.

Q. Within the territory of South Gate and vicinity? A. Yes, sir.

Q. You testified that you purchased control of the corporation. It is a corporation, is it? [8]

A. Yes, sir.

Q. And a corporation of what state?

A. The state of Colorado.

Mr. Caughey: May your Honor please, in the pleadings there was a denial made for lack of information and belief that this was a corporation. If Mr. Gordon——

Mr. Gordon: I will stipulate, your Honor.

Mr. Caughey: I have a certified copy available. With the stipulation, it is not necessary to use that.

Q. I show you a check, Mr. Gordon, which I will call a check, entitled Cash Dividend Check Corpo-

(Testimony of Bert Gordon.)

ration on the top, and ask you to look at the same and ask you if you can identify it?

A. Yes, sir. I can identify this. It is the property of our corporation.

Q. That is a cancelled check? A. Yes, sir.

Q. One that has gone through the bank, is that right? A. Yes, sir.

Q. Would you state whether or not that is or is not a negotiable instrument as it is there?

A. As it is here, yes, sir.

Q. What did you have to do insofar as your relationship with the bank or other concerns to make that a negotiable instrument? What did you have to do? [9]

Did you have to make arrangements with the bank or what? A. Yes, sir.

Mr. Gordon: If your Honor please, I will object on the grounds that the instrument speaks for itself. It contains negotiable words and it certainly is in the form of a negotiable instrument.

The Court: You are not denying it is negotiable?

Mr. Gordon: That's right. It is negotiable.

The Court: I will sustain the objection. He agrees it is negotiable.

Mr. Caughey: That's all right. That is what I wanted to establish.

Q. This is a cancelled check which came from the files of the corporation, is that correct?

A. Yes, sir.

Mr. Caughey: I will ask that the cancelled check identified by the witness be admitted in evidence.

(Testimony of Bert Gordon.)

The Court: It may be received in evidence.

The Clerk: Exhibit 1.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

Mr. Caughey: There was also a denial made in the pleading, may your Honor please, for lack of information and belief, as to the certificate of registration secured, the [10] copyright certificate secured. Is Mr. Davis making any point of that?

Mr. Gordon: No. For the purpose of saving time, we will stipulate there was an application made and a certificate rendered by the Copyright Office as set forth in the complaint.

Mr. Caughey: Thank you.

Q. Now, this copyrighted, we will call it a check, that your corporation is exploiting, Mr. Gordon, has it been in the form of Exhibit 1 since your group took over the corporation? A. Yes, sir.

Q. Was that the form which was presented to you at the time your group took over the corporation? A. Yes, sir.

Mr. Gordon: To that I will object, your Honor, as the original form would be the best evidence.

The Court: Overruled. Aren't you stipulating that—

When you filed for your copyright, did you file a form of the check?

Mr. Caughey: Oh, yes. That is shown on the cer-

(Testimony of Bert Gordon.)

tificate of registration, that the copies were received. The date of receipt is shown.

The Court: And is this the form?

Mr. Caughey: Yes, sir.

The Court: That was presented? [11]

Mr. Caughey: Yes, sir.

The Court: Objection overruled.

Mr. Gordon: If your Honor please, I would like to point out to the court that the form which is being presented to the court bears the year 1952 thereon. The copyright was applied for in 1934, and we are very much concerned as to whether or not the original was the same as this 1952 check which has been presented as an exhibit in the complaint.

The Court: This witness says it is the same.

Mr. Caughey: May your Honor please, of course——

The Court: If that was an issue, you could very easily have discovered what the original form was.

Mr. Gordon: We have attempted to. We have written to the United States Patent Office and the Copyright Office and received a letter back from the office which stated that their records show that both copies of this work were returned to the claimant March 3, 1934, so we had no way of knowing what the original looked like.

Mr. Caughey: Of course, the year was changed from time to time, because you redeem them in a specific year, but that is the only change made.

The Court: Objection overruled. If the defendant had any question, I think the defendant could

(Testimony of Bert Gordon.)

have found out by the use of discovery proceedings and looked at the original check, if the original check was available. [12]

Mr. Gordon: All right.

The Court: This witness says they were the same and I will take the witness' testimony until you can show me to the contrary.

Mr. Gordon: Yes, your Honor.

The Court: The depository has always been the Central Bank & Trust Company, of Denver, Colorado?

The Witness: Yes, sir, in that region.

The Court: I assume that these checks were given out to the various customers and they obtained these stamps from the places of business where they do business, and after obtaining the stamps, they put the stamps on the back of the check, and when they get a hundred stamps on the back of the check, then they can cash the check for a dollar?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Caughey): In your testimony, you referred to the fact that you had previously considered other stamps or use of other stamps.

A. Yes.

Q. Had you any one particular stamp in mind you had considered prior to getting into this plaintiff corporation?

A. Yes, sir. The largest stamp company in the United States, I believe, is Sperry and Hutchinson

(Testimony of Bert Gordon.)

Company, S & H Green Stamps. They have had a man calling on our firm for over [13] 25 years trying to sell us.

Q. Are you familiar with the method that they use? A. Yes, sir.

Q. In utilizing their stamps? A. Yes, sir.

Q. Would you briefly state it to the court?

A. Yes, sir. You purchase stamps from them and then you hand them out at the rate of one for each 10-cent purchase from your customer. In other words, if a customer bought \$1.00 worth of merchandise, you would give 10 stamps. The customer in turn accumulates these stamps and pastes them into a little booklet, and then they take the booklet to a redemption center that is owned by S & H Green Stamp Company, and for so many books of stamps, they are entitled to receive various forms of premiums, such as toasters, lamps, and many and various sundry items.

Q. The stamps which the court referred to in questioning you, are those stamps which are furnished by your corporation? A. Yes, sir.

Q. For the purpose of applying them to the back of the check? A. Yes, sir.

The Court: You sell these stamps to the merchants?

The Witness: Yes, sir, and provide them with these—— [14]

The Court: With the blank checks?

The Witness: Yes, sir.

The Court: All right.

(Testimony of Bert Gordon.)

Q. (By Mr. Caughey): Now, have you found it is necessary in some states, in order to comply with the provisions of the corporation laws, the laws of the various states, to secure permits to do business under this particular way of doing business?

A. Yes, sir.

Q. How about the State of California?

A. Yes, sir, very decidedly in this state.

Q. In other words, the State of California takes the position it is necessary to secure a permit to do business as you are doing it in exploiting this particular copyright?

A. Yes, sir. We first registered with the state and then we later formed a separate corporation in the state, and also the Commissioner of Corporations ruled that a certain statute was in force that requires any company issuing stamps with cash value, in which the public receives cash, you have to qualify with the Commissioner of Corporations under the Securities Act, and we therefore had to secure a permit from the Commissioner of Corporations, and we pay a fee, as a matter of fact, for each stamp that we dispense in the state.

Mr. Caughey: May your Honor please, I have the permit available, and exhibiting it to Mr. Gordon might be all [15] that is necessary.

I just want to show we have complied with the laws of the state, so there won't be any question.

Mr. Gordon: May I see it?

(Mr. Caughey handing document to Mr. Gordon.)

(Testimony of Bert Gordon.)

Mr. Caughey: It may be that Mr. Gordon's clients have also done this to show that they carry on similar business.

Mr. Gordon: I will stipulate, your Honor, that the plaintiff has complied with the laws of the State of California with regard to incorporation and the distribution of its securities.

Mr. Caughey: Thank you.

Q. Mr. Gordon, you mentioned a number of states in which the copyright is being exploited. Is this a constant expanding of your business? Have you plans to expand it to other states? Is that the procedure?

A. Yes, sir, with a normal growth pattern.

Q. Is this a substantial business, Mr. Gordon, that is being carried on by the corporation?

A. Yes.

Q. Can you give some idea of the business so that the court may have some idea of what is involved here, particularly on the question of damages? I think the court has the power to assess whatever damages he sees fit in a copyright [16] case.

A. Yes. It is becoming a very large business. For example, the volume used, for example, in dollars and cents volume, we have one account here in Southern California that is over—almost \$400,000 a year for our stamps, just one firm with seven stores.

Naturally, of course, grocers' volume is the largest. We surround grocers with other small accounts, supporting accounts.

It has been our custom to print the names of the

(Testimony of Bert Gordon.)

various dealers on some of the blank area on the check to show the customers where they may shop and get these cash dividend stamps.

Q. That is, you print the name on the back of the check in the place where the stamps are applied so that they are covered by the stamp when they apply the stamp?

A. They don't cover up the squares, sir. When the stamps are affixed to the inside, of course, it covers up all legends and names.

The Court: When did you first come to California?

The Witness: 1953, sir, I believe.

Q. (By Mr. Caughey): 1953?

A. Or 1952. It may have been in the latter part of 1952 or early part of 1953. I am not just sure.

Q. Are you familiar with the location in which the defendants are doing business, the defendants in this action?

A. Well, I am from Denver, sir. I am not exactly sure, but I know it is within the Southern California territory that is franchised out to this Check System.

Q. Have the activities of the defendants, to your knowledge, interfered with the exploitation of your copyright within this territory? A. Yes, sir.

Mr. Gordon: If your Honor please, I believe that asks for a conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Caughey): Is your licensee doing business in the same territory within which the de-

(Testimony of Bert Gordon.)

defendant is doing business? A. Yes, sir.

Mr. Caughey: I believe that's all of this witness, your Honor please.

The Court: Cross-examine.

Cross-Examination

By Mr. Gordon:

Q. Mr. Gordon, prior to the time you say you took an active participation in the plaintiff corporation, you had been approached by other dealers in stamp plans, is that correct? [18]

A. Yes, sir.

Q. So that the stamp plan is not a unique idea, is it? I mean there were others who were using the stamp plan.

A. I don't quite follow you, what you mean by stamp plan. Could you clarify that a little?

Q. You spoke about the S & H stamp plan representative having come to visit with you.

A. Yes.

Q. And attempted to secure your business, is that right? A. Yes, sir.

Q. Do you know whether there are other stamp plans other than S & H stamp plan?

A. Yes, sir.

Q. Do you know the names?

A. There are firms such as Red Stamps, Brown Stamps.

Q. In fact, there are several stamp companies.

A. Yes.

(Testimony of Bert Gordon.)

Q. That have different color stamps and different name stamps, but their purpose is to have the public receive some redemption value on those stamps, is that correct?

A. Ultimately. A lot of them have printing—it is ambiguous what the value is. I don't know.

Q. Have you ever heard of the National Business Promotion Corporation? [19]

A. Yes, sir.

Q. They are a California corporation?

A. I am not sure they are a corporation. They are in California, yes.

Q. Do you know what plan that is?

A. Yes, sir.

Q. Is it similar to the one which the plaintiff is using in this case and the defendant?

A. In what form are you referring to? It is probably incidental, but we also have a court case with them.

Q. May I ask you this? Do you know whether or not they are also using a check form for the distribution of their stamps?

A. Yes, sir.

Q. And the same procedure is used by that corporation for the pasting of stamps upon the back of the check, is that correct?

A. Yes, sir.

Q. Let me ask you this. In what way, Mr. Gordon, is your stamp plan different from the other stamp plans which now exist?

A. Well, first——

The Court: Now, that may be a little confusing, because evidently there are several companies that

(Testimony of Bert Gordon.)

use the check plan, and the check plan may be different from the ordinary [20] plan as used by the Green Stamp Company.

Mr. Caughey: Now, your Honor please, I have looked at the particular check to which Mr. Gordon refers, and I might state that there is now litigation pending against this particular concern for violation of this copyright.

The Court: May I ask the witness a question?

Mr. Caughey: Certainly.

The Court: Do you know when the company was organized that counsel is speaking about?

The Witness: Very well, sir.

The Court: Do you know when it was organized?

The Witness: Yes, sir.

The Court: When?

The Witness: If I may give a little history to the Court, this gentleman, Mr. Brown—is that his name on the check?

Mr. Gordon: The name T. S. Brown appears.

The Witness: Mr. T. S. Brown came to Denver in 1951 seeking a franchise for the State of California and acquired all of our information and came back—this occurred prior to our acquiring control of the company—and after receiving all this information, he came back here and the corporation never heard from him again.

When we started doing business out here, we ran into this situation here where he had copied our

(Testimony of Bert Gordon.)

cash dividend [21] check, and so we filed a lawsuit, I believe it was in 1953, against this company.

The Court: When was the company organized? You said you knew.

The Witness: It had to be organized some time——

The Court: I am not asking when it had to be organized. You don't know?

The Witness: Between 1951 and 1953, sir, in that two-year area.

The Court: All right.

Q. (By Mr. Gordon): Mr. Gordon, of your own knowledge, now, do you know whether your franchise dealer has any dealings with a company called O. K. Baby Shop?

The Court: May I ask a question? According to the testimony of this witness, they came to California and then they organized a corporation. Do you have a franchise? Do you give a franchise to the entire state or to a part of the state to an individual?

The Witness: In California, since it is a large state, we have split it into two or three sections, sir.

The Court: And have you given a franchise to the section around Los Angeles?

The Witness: Yes, sir.

The Court: To whom did you give the franchise?

The Witness: Check System, Incorporated, of San [22] Marino.

(Testimony of Bert Gordon.)

The Court: Of San Marino?

The Witness: Yes, sir.

The Court: When did you do that?

The Witness: I believe it was in November, 1954. They were the second franchise holder in this area. We previously had a franchise holder in 1952, the latter part of 1952.

The Court: Who was he?

The Witness: A partnership composed of Mr. Haymes and Mr. Booth.

The Court: What happened to that franchise? Was it cancelled out or is it still going?

The Witness: They cancelled out.

The Court: When was it cancelled?

The Witness: In 1953.

The Court: Then after you cancelled the franchise with Haymes and Booth, you gave the franchise to the Check System, Incorporated, of San Marino?

The Witness: Yes. We operated ourselves temporarily while we secured a new distributor.

The Court: When you talk about franchise, will you designate who you are talking about? You asked a question about the franchise dealer.

Mr. Gordon: I see what you mean.

Q. Now, Mr. Gordon, the present franchise holder, the [23] Check System Corporation, do you know whether or not they have ever dealt with or had any negotiations for dealing with the O. K. Baby Shop in South Gate?

(Testimony of Bert Gordon.)

A. I myself would be somewhat unable to answer that.

The Court: If you don't know, there is no disgrace in saying you don't know.

The Witness: No, sir.

Q. (By Mr. Gordon): If I were to ask you the same question with respect to these named businesses in South Gate, would your answer be the same? The names I am going to give you are Brad's Bike Shop, Household Hardware & Paint Company, Buc's Union Oil Service, Western Motor Rebuilders, Bill's Quality Meats, Firestone Pottery & Gift Shop, Turnbull Bros. Paint Store, Martin's Cleaning Plant, Parson's Pharmacy, Martin's Radio Center, Layton Rents, and Davis Market?

Mr. Caughey: If your Honor please, unless he can show some materiality of the question, I am going to object.

The Court: If he doesn't know, all he has to say is no.

Mr. Caughey: That's right, but I am objecting to the question before he answers, because I don't think it is proper.

The Court: Overruled.

The Witness: Yes, I have heard of the Davis Market.

The Court: The question is of your own knowledge, [24] not what you have heard. The question was of your own knowledge.

The Witness: Yes, sir, Davis Market.

Q. (By Mr. Gordon): You know there have

(Testimony of Bert Gordon.)

been dealings or negotiations between your present franchise holder and Davis Market, is that correct?

A. You mean where he sold Davis Market?

Q. Where he what?

A. You mean where my franchise holder has sold Davis Market?

Q. He has sold or attempted to sell your system to any of these named persons or firms.

The Court: Do you know what your franchise holder does?

The Witness: Yes, sir. I get a monthly report of their activities and who they sell.

The Court: Well, that's hearsay. Of your own knowledge, now, have you ever called upon any of these parties?

The Witness: Personally, no, sir. The territory is entrusted to our franchise holder and he renders——

The Court: All you know about it is the reports you get from the franchise holder?

The Witness: Yes, sir.

Mr. Gordon: I have no further questions, your Honor. [25]

The Court: Any other questions?

Mr. Caughey: No, sir.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Caughey: Mr. Davis.

LEONARD F. DAVIS

one of the defendants, called as a witness by the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated and state your name, please?

The Witness: Leonard F. Davis.

Direct Examination

By Mr. Caughey:

Q. Would you please state your name?

A. Leonard F. Davis.

Q. Are you the Leonard F. Davis who is one of the defendants in this action? A. Yes, sir.

Q. I note there is another defendant, Wayne Layton. Do you know Mr. Layton?

A. Yes, sir.

Q. Is he the gentleman sitting in court [26] here? A. Yes, sir.

Q. What association have you with Mr. Layton in a business way?

A. Well, he has a business right across the street from me down a little ways.

Q. Are you and Mr. Layton doing business under the firm name and style of Cash Savings Check Corporation?

A. Yes, sir.

Q. How long have you been engaged—

The Court: May I ask a question here?

Mr. Caughey: Yes, sir.

The Court: Is this a fictitious name? Can they use corporation in a fictitious name?

(Testimony of Leonard F. Davis.)

Mr. Gordon: If your Honor please, it is not a fictitious name. There is a corporation.

The Court: **Known as Cash——**

Mr. Gordon: Cash Savings Check Corporation, which was incorporated September 12, 1955. The corporation number is 308851. The date is September 12, 1955, being prior to the filing of the commencement of this action.

Mr. Caughey: In view of the statement of counsel, may we have an amendment of the complaint to show that the Cash Savings Check Corporation is a corporation instead of a fictitious name?

The Court: Yes. I never heard of a fictitious name [27] using the word corporation before.

Mr. Gordon: That is correct, your Honor.

The Court: I didn't think it was allowed.

Mr. Caughey: It has been done, sir.

The Court: Has it?

Mr. Caughey: Yes, sir.

The Court: All right. I am learning something new every day.

Mr. Caughey: A lot of companies when they do business as a fictitious firm name will use the corporation name as a fictitious firm name.

Q. Are you associated with the Cash Savings Check Corporation, a California corporation, Mr. Davis? A. Yes.

Q. What is your position with that concern?

A. President.

Q. What is the position of Mr. Layton with that concern? A. Vice president.

(Testimony of Leonard F. Davis.)

Q. Is it a fact that you and Mr. Layton caused this corporation to be formed? A. Yes, sir.

Q. And for the purpose of engaging in the business which the corporation is carrying on?

A. That's right, sir. [28]

Q. What is the business of that corporation?

A. It is—well, we use it for advertising purposes is what we use it for.

Q. What is that?

A. We use it for advertising.

Q. Would you be a little more explicit on what you mean by advertising?

A. We are using the Cash Saving Check Corporation——

Mr. Gordon: If your Honor please, in order to save the time of the court, I have a copy of the articles of incorporation. They certainly will tell what the powers and the purposes of the corporation are.

Mr. Caughey: That is general. I want him to be more specific as to what the corporation is actually doing.

Mr. Gordon: We will stipulate the corporation is actually distributing the check form of cash savings check.

Mr. Caughey: Such as shown in Exhibit 2 to the complaint?

Mr. Gordon: No, sir. Counsel remembers Mr. Davis and I appeared at your office upon the filing of the complaint and we at that time attempted to work out a settlement——

(Testimony of Leonard F. Davis.)

Mr. Caughey: We won't go into that.

Mr. Gordon: But at that time we sent to you a new form of check.

Mr. Caughey: I understand. [29]

Mr. Gordon: Which is now in use.

Mr. Caughey: I will bring that out by the witness.

Q. When did this corporation go into business, Mr. Davis? When did it first engage in business?

A. We started in business, I believe, the last of August, in 1955.

The Court: That is not particularly true, is it? The corporation didn't start in business. The corporation was not organized at that time.

Mr. Gordon: That's right. They were at that time attempting to organize themselves so they could.

The Court: As individuals, you started business in August, is that right, as individuals?

The Witness: Yes.

Q. (By Mr. Caughey): And you continued as individuals doing business until the corporation was formed, is that correct?

A. Well, it was formed before—well, I don't know. I guess legally it isn't formed until the date seal on the corporation.

Mr. Caughey: That is correct.

The Court: What was the date of the corporation?

Mr. Gordon: September 12, 1955, your Honor.

(Testimony of Leonard F. Davis.)

Q. (By Mr. Caughey): So, therefore, for a relatively short time prior to the formation of the corporation, you carried [30] on the business as individuals?

A. As far as any finance or anything like that, no. We just started. We didn't do any business until after we received that.

The Court: May I ask a question?

Mr. Caughey: Yes.

The Court: Did you issue any checks before the corporation was formed? Were there any checks issued or any stamps sold before the corporation was formed?

The Witness: Yes, there was.

The Court: When did you first start to issue the checks or sell the stamps?

The Witness: I believe it was September—no, it was August, right the last of August, sir.

The Court: The latter part of August?

The Witness: Yes.

The Court: Then in September the corporation was formed and the corporation took over all its business?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Caughey): Prior to the time the corporation was formed, the ones who were carrying on the business were Mr. Layton and you, is that correct? A. That's right.

Q. Now, I show you Exhibit 2 to the complaint, Mr. [Davis, which by the pleadings is admittedly a

(Testimony of Leonard F. Davis.)

check which was issued either by the corporation or by you and Mr. Layton prior to the time the corporation was formed. A. Yes, sir.

Q. Do you recognize that check?

A. Yes, sir.

Q. What is it?

A. It is the one we started out with, the check itself.

Q. And you distributed those checks to merchants in South Gate, did you?

A. The ones that are listed there, yes, sir.

Q. The ones that are listed on the check, whose names are printed on the check, is that correct?

A. That's right.

Q. You supplied stamps to those concerns?

A. Yes, sir.

Q. For the purpose of applying the stamps to the back of the check in the space provided for, is that right? A. That's right.

Q. Prior to the time you and Mr. Layton caused this check to be printed or produced, you had knowledge of the activities, did you not, of the plaintiff corporation and its licensees?

A. Now, if I understand you right, you mean by knowing them, or—— [32]

Q. No. You knew what they were doing?

A. No, I did not.

Q. You had never seen any of their checks prior to the time Mr. Layton and you went in business?

A. Oh, yes, I seen the checks.

Q. So you had seen them and you were aware of

(Testimony of Leonard F. Davis.)

the fact they were engaged in this check business in Southern California, were you not?

A. Well, I seen a check. I did not know them personally or the company. I haven't seen many of them.

Q. I did not ask you that. I am talking about the check itself and the fact that you knew they were engaged in business here through their own efforts or through a franchise holder in Southern California.

A. The only way I knew was I happened to get hold of one of them through the Iowa Pork Shop, is all.

Q. What's that? I didn't understand.

A. I was shopping at the Iowa Pork Shop and got hold of one of them, and I thought it was a good idea.

Q. You thought it was a good idea?

A. That's right.

The Court: When was this?

The Witness: That was in around about May or so of 1955.

Q. (By Mr. Caughey): Then you contacted Mr. Layton and [33] told him about it?

A. There was also another one there. There is a Cash Discount Coupon check that they were using, and I looked at both of them, and we used that to help set up this advertising idea that we had.

Q. So that you had this check of the plaintiff corporation available at the time that you made up your check, is that correct? A. That's right.

(Testimony of Leonard F. Davis.)

Q. As a matter of fact, you practically copied it, didn't you?

A. Well, yes, it is about the same. We didn't try to copy it word for word. We used their idea.

Q. You are still engaged, the corporation, the Cash Savings Check Corporation is still engaged in this business; is that correct?

A. That's right.

Q. Are you and Mr. Layton the sole owners of the corporation?

A. No, we are not.

Q. Are there others also that are stockholders?

A. Yes, sir.

Q. Where are you engaged in business, what particular vicinity in Southern California?

A. South Gate. [34]

Q. Just within the city limits of South Gate?

A. Yes.

Q. Do you use this check in your own business, Mr. Davis?

A. Yes, we do.

Q. And the stamps in your own business?

A. Yes.

Q. You operate Davis Markets, do you?

A. That's right.

Q. You have found, have you not, that by the use of this check you have increased your sales considerably?

A. I have increased my sales, yes.

Q. Have you had any contact whatsoever prior to today with any official of the plaintiff corporation?

A. Yes.

Q. Who?

A. I don't know their name, but they came in,

(Testimony of Leonard F. Davis.)

and I believe they said that they had a franchise for Southern California.

Q. When was that?

A. I am not sure of the date, but it was somewhere in October, I believe.

Q. Subsequent to that time, you commenced your operations?

A. Wait a minute. It would have to be before that. It [35] would have to be the first of September, because they served me with the notice in the last part of September, so it had to be the middle of September when they saw me. After that time I never seen any of them.

Q. Has anybody contacted you relative to using this particular check prior to the time you saw the check that you stated, I believe, was in the Oaks Market, or where was it you first saw one of these checks?

A. Iowa Pork Chops.

Q. Had anybody connected either with the plaintiff corporation or any franchise holder or licensee contacted you prior to that time?

A. No, not from this company.

Q. Not from this company? A. No.

Q. Had they from some other company?

A. The Cash Discount Corporation had approached me on it, but that is the only one.

Mr. Caughey: May your Honor please, I might state for the benefit of the court that that corporation which he has now referred to is the defendant in another action pending in this Federal District

(Testimony of Leonard F. Davis.)

and that Mr. Brown is one of the persons who formed that particular corporation.

Q. How long did you use this check, which is exemplified by Exhibit 2 to the complaint, for how long a period of time [36] did you use it?

A. When they served me with the papers, I immediately went to my attorney and showed it to him, and we immediately set up, and I believe we called you before we did anything with the check, and we went ahead and fixed up another check.

Q. For how long a time did you use this particular check, Exhibit 2?

A. It was less than two months.

Q. You mean beginning from the first time, some time in August, that you first used the check, it was approximately two months?

A. About the middle of October we had the other check printed and picked up the others that we distributed before that.

Q. Have you available one of the checks which you are now using?

A. Yes, sir. I believe my attorney has one there.

Q. Can you produce the same?

A. Yes, sir.

Q. Your counsel has submitted a check to me. Is this the one that you have reference to?

A. No. This isn't the one, but this is the same thing, except it has 1956 on it. The other was 1955.

Q. So except for the year, it is the same check which you testified that you changed to some time in the latter part [37] of October or thereabouts?

(Testimony of Leonard F. Davis.)

A. Yes, sir.

Q. And that you used continuously since, is that correct? A. Yes, that's right.

Mr. Caughey: I ask that this check identified by the witness be marked as plaintiff's exhibit next in order.

The Court: It may be marked in evidence.

The Clerk: Exhibit 2.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Caughey): Do you consider that the Plaintiff's Exhibit 2 that you have already identified that you previously used was a negotiable check? A. Yes, it is a negotiable check.

Q. And also the check which you identified as Plaintiff's Exhibit 2 is also negotiable?

A. You mean the first one you showed me?

Q. This one I just showed you, the Plaintiff's Exhibit 2. A. Yes, that is negotiable.

Q. That is, it is immediately negotiable when they have put stamps attached to the back, is that right? A. That's right.

Q. And both of those checks are checks which are distributed [38] to merchants and the stamps are distributed to merchants, and then the purchaser of the merchandise from the merchants receives stamps and they are applied on the back of the check until the check is filled up? A. Yes, sir.

Q. Now, you have how many spaces on the back?

(Testimony of Leonard F. Davis.)

A. We have 100.

Q. That is the same number of spaces that the plaintiff corporation has, is it not?

Mr. Gordon: If your Honor please, the question actually is one which is answered by the facts, before the Court.

The Court: The exhibits are the best evidence.

Mr. Gordon: That's right.

Mr. Caughey: That is correct.

Mr. Gordon: I will stipulate each one bears the requirement of 100 stamps.

Mr. Caughey: And at a half cent each——

Mr. Gordon: I don't know how you are going to figure it, but they require 100 stamps and you get \$1.00 for 100 stamps attached to the check.

Mr. Caughey: Right.

Q. Then I assume, Mr. Davis, after the checks have gone through the bank that they are cancelled and returned to you? A. Yes, sir.

Q. Isn't it a fact that you have had some checks returned [39] with stamps of the plaintiff corporation thereon?

A. No, I have not had one returned.

Q. You have never had that happen to you?

A. No.

Q. Have you examined all your returned and cancelled checks with the stamps on?

A. Yes, sir.

Q. You have not had any occasion where there has been any from merchants other than those with whom you were dealing? A. That's right.

(Testimony of Leonard F. Davis.)

Q. What is the extent of the business that you are doing in these checks and stamps attached thereto? Are you familiar with the extent of the business carried on by the corporation?

A. Yes.

Q. Would you please give me to the best of your knowledge the extent of the business, monthly, if you can?

A. That I don't know. I couldn't—it would be an approximate figure. About \$250 or \$300.

The Court: In what time?

The Witness: A month.

Q. (By Mr. Caughey): A month?

A. The sales of stamps themselves.

Q. That is of stamps themselves from the corporation, is [40] that correct?

A. Yes, that's right. That is the gross sales.

The Court: You don't sell the checks, the blank checks?

The Witness: No.

The Court: So the only income is from the sale of stamps?

The Witness: Yes.

The Court: You say that would be what?

The Witness: \$250 to \$300.

The Court: Per month?

The Witness: Per month.

Q. (By Mr. Caughey): To whom do you sell these stamps?

A. The merchants that are in the advertising idea, in with us on that.

(Testimony of Leonard F. Davis.)

Q. You also use the stamps in your own business, is that correct?

A. Well, I consider myself as one of the businesses, yes.

Q. In that \$250 or \$300 a month, did you include the business which you were doing in stamps?

A. That's right, sir.

Q. Your own business?

A. That's right, sir.

Q. Did you or Mr. Layton go out and contact these merchants [41] and cause them to purchase your stamps?

A. Yes, we did.

A. Yes, we did.

Q. In other words, you went out and told them you were putting out this check and explained it to them and asked them to purchase these stamps?

A. Yes.

Q. And you supplied them with the printed checks, is that correct?

A. That's right, to go along with the advertising deal we had planned.

Q. These merchants that you have listed on the checks, Plaintiff's Exhibit 2, are they prominent merchants in South Gate?

A. Yes, sir.

Q. And carry on a substantial business there, is that correct?

A. That's right, sir.

Mr. Caughey: I believe that will be all. [42]

(Testimony of Leonard F. Davis.)

Cross-Examination

By Mr. Gordon:

Q. Mr. Davis, with regard to the check which was introduced as being used by your company now, is that check sold to the dealers or given to them?

A. It is given to them.

Q. Do you sell them anything with the [47] check?

A. No. All we sell is the stamp.

Q. You sell stamps for the checks, is that correct? A. That's right.

Mr. Gordon: I think counsel has seen the stamp.

Q. I have here 10 in number of 1-cent Cash Saving Check stamps. A. That's right.

Q. I will ask you if these are the stamps which you sell to the dealers. A. Yes.

The Court: That may be admitted as Defendants' Exhibit A.

Mr. Gordon: I was only going to have it introduced as an exhibit, not in evidence yet, but just for identification.

The Court: Is there any objection to it?

Mr. Caughey: No.

The Court: In evidence.

The Clerk: Exhibit A.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit A.)

Mr. Gordon: I have no further questions.

The Court: You may step down.

Mr. Caughey: Just one other question. [48]

(Testimony of Leonard F. Davis.)

Redirect Examination

By Mr. Caughey:

Q. You testified you gave the checks away and sold the stamps? A. Yes.

Q. You gave the checks away for the purpose of having the stamps attached to them, isn't that a fact? A. That's right.

Mr. Caughey: That's all.

Mr. Gordon: Nothing further.

The Court: Step down.

(Witness excused.)

Mr. Caughey: Mr. Beebe, please.

EARL BEEBE

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, sir?

The Witness: Earl Beebe, B-e-e-b-e.

Direct Examination

By Mr. Caughey:

Q. Where do you reside?

A. In San Marino.

Q. What is your business? [49]

A. Well, we are engaged in several businesses, but one business is the operating of the Check Sys-

(Testimony of Earl Beebe.)

tem, Inc., a California corporation, distributing these Cash Dividend Savings stamps.

Q. What is your position with the company?

A. I am vice president of the corporation.

Q. Is that a California corporation?

A. Correct, sir.

Q. Do you know when it was organized?

A. To the best of my knowledge, in October of 1954.

The Court: And since that time you have been engaged in this business, have you?

The Witness: Correct, sir.

Q. (By Mr. Caughey): Have you any contractual relations with the plaintiff corporation?

A. We have a contract with the—may I say the parent corporation, whereby they furnish us the checks and the stamps, which we sell to the local dealers. We are operating as their so-called agent in California.

Q. Where do you operate, within what territory?

A. Los Angeles County, Orange County. We have the right to operate in other counties, but we haven't expanded over all the area yet.

Q. Do you operate in the vicinity of South Gate, California? [50]

A. Yes, sir, on all sides and around South Gate.

Q. But not in South Gate?

A. That I would have to look over our records to know what the actual boundaries are. I would assume we have some dealers within the city limits of

(Testimony of Earl Beebe.)

South Gate. I cannot answer that question to my certain knowledge.

Mr. Gordon: If your Honor please, I move to strike after where he says "I assume."

The Court: He says he doesn't know. Denied.

Q. (By Mr. Caughey): You are operating in Huntington Park, are you? A. Right.

Q. That is the adjacent city?

A. I believe so, sir.

Q. Have you ever met Mr. Davis, one of the defendants, who is connected with the defendant corporation? A. I have, sir.

Q. When did you first meet him?

A. Counsel, I would say that was in the latter part of August, 1955.

Q. Where did you meet him?

A. At his place of business.

Q. Did you go there to his place of business?

A. Yes, sir.

Q. Would you state why you went there? [51]

A. May I introduce a point? We have a sales manager, Mr. Benolken, in the area, and as soon as this plan was started, let us say in a week, it might have been more than that, it was called to our attention that we had people operating a system, a plan or idea similar to ours, and we called on these people to call their attention to the fact that we had the copyright on the check and the stamps.

Q. You say "we were." Who do you mean by "we"? A. Mr. Benolken and I.

Q. So you both went there together?

(Testimony of Earl Beebe.)

A. That is correct.

Q. And you talked to Mr. Davis?

A. I think I talked to Mr. Davis. I believe there is a father and son, but I am not certain whether it was this particular Mr. Davis.

Q. You talked to someone in charge?

A. That is correct. I believe it was probably this Mr. Davis. I might add that he was very courteous and we had a very friendly conversation.

Q. In talking to him, did he say whether he was aware of your activities in Southern California?

A. Correct, sir.

Q. He did? A. That's right.

Q. And you told him that you had a franchise in Southern [52] California, did you?

A. We told him we had a contract with the parent company, a franchise for the area.

Q. Do you know Mr. Layton, who is here in the room? A. Yes.

Q. Did you talk to him?

A. Prior to my talking to Mr. Davis.

Q. On the same day?

A. Within an hour or so of each other.

Q. What did Mr. Layton say to you when you talked to him?

A. Substantially that he was a part of the organization, Mr. Davis was president of the organization, and if I wanted to talk to the people that would be in charge, to go see Mr. Davis. I had probably 10 minutes of informal discussion with Mr.

(Testimony of Earl Beebe.)

Layton about our having this copyright and their probable violation of our copyright.

Q. Have you made any attempt to sell your checks or your stamps to any merchant in South Gate who has refused to take the same because of the fact of the existence of this defendant corporation's check, stamps and checks there?

Mr. Gordon: Your Honor please, I object to the question on the ground, first of all, it is ambiguous, and, second, it calls for a conclusion of the witness.

Mr. Caughey: I don't think it is a conclusion at [53] all.

The Court: Overruled. Do you understand the question?

The Witness: Yes, sir.

The Court: Overruled.

The Witness: Counsel, will you please state it again?

The Court: Read the question.

Mr. Caughey: I better reframe the question in view of the objection.

Q. Have you ever had occasion to contact any merchant in South Gate for the purpose of endeavoring to sell your checks and stamps who has refused to do so because of the existence in the territory of the defendant corporation?

Mr. Gordon: Your Honor please, again I will object on the ground it calls for a conclusion of the witness and is hearsay as to what the reasons are for a person's refusing to do business with this man.

The Court: May I put it this way? Have you

(Testimony of Earl Beebe.)

ever called upon anyone down in this particular area relative to purchasing your stamps?

The Witness: I personally, within the city of South Gate, no. In Huntington Park, yes, but our sales manager in South Gate——

The Court: You can't tell what your sales manager [54] did.

The Witness: Okay.

The Court: You didn't call on anybody in South Gate?

The Witness: That's right.

Q. (By Mr. Caughey): Not you personally?

A. That's right.

Q. Just your sales manager?

A. That's right.

Mr. Caughey: That's all.

Mr. Gordon: I have no questions.

The Court: You may step down.

(Witness excused.)

Mr. Caughey: The plaintiff rests, may your Honor please. [55]

* * *

LEONARD F. DAVIS

called as a witness by and on behalf of the defendants herein, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Gordon:

Q. Mr. Davis, I believe you testified upon examination by Mr. Caughey, that you had gotten the idea for the plan or system that you have for the checks from a purchase that you made at the Iowa Pork Shop, is that correct? A. That's right.

Q. What were you given at the Iowa Pork Shop that gave you this idea?

A. They asked me if I was saving the stamps and I said yes.

Q. And they gave you what?

A. When I purchased the merchandise, they gave me these Cash Dividend stamps that they had.

Q. Prior to that time had you been seeking some scheme [56] or plan for advertising, for promotion of your business? A. I had.

Q. Had you been approached by any other persons who sold any schemes or plans for promotion of business? A. Yes.

Q. Do you know who they were?

A. The Blue and Gold Stamp Company approached me, and also the Cash Discount Coupon Company. I guess they are under another name.

Q. They are all stamp saving outfits, is that right? A. That's right.

(Testimony of Leonard F. Davis.)

Q. Did you put any of those into use in your place of business at all? A. No, I didn't.

Q. When was the first time that you actually put the check and the stamp system into your place of business, the Davis Market?

A. I don't know the exact date, but it was in the last part of August. I don't know exactly the day, but it was the last part of the month of August.

Q. The stamps that you were using, are they the same form that you have at the present time?

A. Yes.

Q. The ones that were introduced by Defendants' Exhibit A are the ones that you have always used, is that right? [57] A. That's right.

Mr. Gordon: I have no further questions, your Honor.

Mr. Caughey: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Gordon: The defendant rests, your Honor.

The Court: Any other testimony?

Mr. Caughey: Well, no, sir. I have got the check in.

The Court: The defendant has rested, so I was wondering whether you had any other testimony.

Mr. Caughey: No, sir. I think with that testimony your Honor is able to pass upon the case. [58]

* * *

Mr. Caughey * * * The defendants have, with knowledge and access to this particular check, in effect copied it.

The Court: No question in my mind they copied it. No question about it. [60]

Mr. Caughey: Yes, sir.

The Court: They copied it. The only question is, did they have a right to copy it?

* * *

[Endorsed]: Filed August 13, 1956. [61]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 25, inclusive, contain the original

Complaint;

Answer;

Findings of Fact, Conclusions of Law & Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Order Extending Time to Docket Record on Appeal;

which, together with a full, true and correct copy of the Cost Bond on appeal; 1 volume of reporter's

transcript; and plaintiff's exhibits 1 & 2 and defendants' exhibit A, all in the above-entitled cause, constitute the transcript of record on appeal to the United States District Court for the Ninth Circuit in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 13th day of September, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15289. United States Court of Appeals for the Ninth Circuit. Cash Dividend Check Corporation, Appellant, vs. Leonard F. Davis and Wayne Layton, Doing Business Under the Fictitious Firm Name and Style of Cash Saving Check Corporation and Cash Saving Check Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15289

CASH DIVIDEND CHECK CORPORATION, a
Corporation,

Plaintiff-Appellant,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
Doing Business Under the Fictitious Firm
Name and Style of CASH SAVING CHECK
CORPORATION, and CASH SAVING
CHECK CORPORATION, a California Cor-
poration,

Defendants-Appellees.

CONCISE STATEMENT OF POINTS

The appellant, Cash Dividend Check Corporation, pursuant to the provisions of Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, does hereby designate the following as the concise statement of points upon which it will rely on appeal:

1. That the work exemplified by Exhibit 1 to the complaint embodies subject matter which is entitled to a statutory copyright under the provisions of Title 17, United States Code, § 10.

2. That the work exemplified by Exhibit 1 to the complaint contains original subject matter and secures to the plaintiff a valid statutory copyright

under the provisions of Title 17, United States Code, § 10.

3. That the work exemplified by Exhibit 2 to the complaint embodies original subject matter of plaintiff's statutory copyright and is an infringement thereof.

4. That the work exemplified by Plaintiff's Exhibit 2 embodies original subject matter of plaintiff's statutory copyright and is an infringement thereof.

5. That the Trial Court erred in finding in Finding of Fact V that Plaintiff's Exhibit 1 did not embody subject matter which would entitle it to a valid statutory copyright.

6. That the Trial Court erred in failing to find that Exhibit 2 to the complaint and Plaintiff's Exhibit 2 were infringements of plaintiff's statutory copyright.

7. That the Trial Court erred in finding in Finding of Fact IX that the action of defendants in publishing and distributing the works exemplified by Exhibit 2 to the complaint and Plaintiff's Exhibit 2 have not caused any damage or injury to the plaintiff.

LYON & LYON,

/s/ R. E. CAUGHEY,

Attorneys for Appellant.

[Endorsed]: Filed September 28, 1956.

No. 15289

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CASH DIVIDEND CHECK CORPORATION,

Appellant,

vs.

LEONARD F. DAVIS and WAYNE LAYTON, Doing Business
Under the Fictitious Firm Name and Style of CASH
SAVING CHECK CORPORATION and CASH SAVING CHECK
CORPORATION,

Appellees.

APPELLANT'S OPENING BRIEF.

LYON & LYON,

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FILED

DEC 26 1956

PAUL P. O'BRIEN, CLERK



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No. 15289
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CASH DIVIDEND CHECK CORPORATION,

Appellant,

vs.

LEONARD F. DAVIS and WAYNE LAYTON, Doing Business
Under the Fictitious Firm Name and Style of CASH
SAVING CHECK CORPORATION and CASH SAVING CHECK
CORPORATION,

Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal from a judgment and decree of the District Court for the Southern District of California, Central Division [R. 19]. The cause of action, as stated in the complaint [R. 3-8], is one for infringement of a statutory copyright secured by compliance with the provisions of Section 10, Title 17 USC. The appellant obtained registration of its claim to copyright pursuant to the provisions of Section 11 of Title 17 and a certificate of registration covering said claim was issued to appellant on February 15, 1934, and identified as Class AA 139152. The work for which said copyright was secured is exemplified by Exhibit 1 to the complaint; the registration thereon is exemplified by Exhibit 3 thereto. The District

Court decreed [R. 19] that the work exemplified by said Exhibit 1 was not a valid copyright under the provisions of Section 10, Title 17 of the United States Code and under the Copyright Laws of the United States and dismissed the complaint on its merits. The issue of the validity of the statutory copyright and the registration secured thereon is raised by the notice of appeal [R. 20].

Jurisdiction.

Jurisdiction to review the judgment and decree of the District Court is conferred by Section 1291 of Title 28 USC inasmuch as the judgment and decree of the District Court was final. Said judgment and decree was entered on August 6, 1956 [R. 19-20]. The notice of appeal was given and filed on August 7, 1956 [R. 20]. The appeal was, therefore, taken within the thirty day period provided for in rule 73 of the Federal Rules of Civil Procedure (Title 28 USC Rule 73(a)).

Jurisdiction over the subject matter was conferred upon the Court below by Section 1338(a) of Title 28 USC. Jurisdiction over the appellees was obtained by the provisions of Section 1400(a) of Title 28 USC, the appellees being residents of the Southern District of California, Central Division.

Statement of the Case.

The action was filed by Cash Dividend Check Corporation, a Colorado corporation, against Leonard F. Davis and Wayne Layton, doing business under the fictitious firm name and style of Cash Saving Check Corporation. At the trial of the action the Court ordered that Cash Saving Check Corporation, a California corporation, be

made a party defendant [R. 44]. The complaint alleged [R. 5] that the defendants Leonard F. Davis and Wayne Layton caused to be published and placed upon the market a book entitled "Cash Saving Check", copied largely from plaintiff's book "Cash Dividend Check Pay to the Order of." The work of the plaintiff and appellant and alleged to be covered by a statutory copyright is exemplified by Exhibit 1 to the complaint. The alleged infringing work is exemplified by Exhibit 2 thereto. The answer [R. 13], for lack of sufficient information to form a belief, denies the allegations of infringement of the statutory copyright and the securing of the same by complying with the provisions of Sections 10 and 11 of Title 17 USC. The answer [R. 14] admitted the publication of the alleged infringement, Exhibit 2 to the complaint. No affirmative defenses were pleaded in the answer going to either the issue of validity or infringement of the statutory copyright. The issues raised by the complaint and answer are the validity of the statutory copyright and the infringement thereof by the published works of the appellees. The sole issue determined by the District Court was that of validity of the statutory copyright as claimed by the certificate of registration issued by the Register of Copyrights.

The Findings of Fact and Conclusions of Law [R. 15-18] were directed solely to the question of validity. No findings or conclusions were made upon the issue of infringement. The Court refused to make any such findings, stating that its finding of invalidity of the statutory copyright obviated the necessity of findings on infringement.

The notice of appeal [R. 20] brings before this Court the issue of whether the Court below was correct in de-

creeing in the judgment [R. 19] that the work exemplified by Exhibit 1 to the complaint was not such a work as could be covered by a statutory copyright pursuant to the provisions of Section 10, Title 17 USC. There was no issue before the Court as to the appellant failing to comply with the provisions of said Section 10 as to proper notice and publication of the work.

The Copyright in Suit.

Anyone who is entitled to secure a copyright pursuant to the provisions of Title 17 USC may do so by complying with the provisions of Section 10 of said Title. An action for infringement of said copyright may be brought if the claimant has, pursuant to the provisions of Section 11 thereof, obtained registration of the claimed copyright by complying with the provisions of said Title, it being provided upon such compliance the Register of Copyrights shall issue the certificate which is provided for in Section 209 of said Title.

Counsel for the appellees stipulated that an application for certificate of registration was made and a certificate was issued by the Copyright Office, as alleged in the complaint [R. 29]. This certificate exemplified by Exhibit 3 to said complaint. Pursuant to the provisions of Section 209 of Title 17, the certificate is *prima facie* evidence of the facts stated therein. These facts are, as shown by Exhibit 3, that copies of the work entitled "Cash Dividend Check Pay to the Order of" were received on February 15, 1934 by the Register of Copyrights and that the affidavit in connection therewith was received on the same date. The certificate further shows that the date of publication of the work covered by said certificate was on

February 10, 1934. No evidence was introduced by appellees which in any manner refuted said facts.

Pursuant to the provisions of Section 5 of Title 17, the application for registration must specify which of the classes listed therein is covered by the work for which copyright is claimed. The certificate of registration exemplified by Exhibit 3 to the complaint shows that the entry of classification was made in Class AA and with the registration number being 139152. This classification under Section 5 is for Books, including composite and cyclopedic works, directories, gazetteers, and other compilations. There is no evidence in the record or before the Trial Court that the classification of the work as a Book in Class A was in error or that the Register of Copyrights in any manner failed to perform his administrative functions.

There is no issue as to the fact that the work exemplified by Exhibit 1 to the complaint is the work covered by said certificate of registration as exemplified by Exhibit 3 thereto. Said work is for use in a method of doing business whereby saving stamps supplied by appellant or its licensees are issued by merchants to purchasers of goods and affixed to the work exemplified by Exhibit 1 in the spaces provided for. As soon as the number of stamps specified on said work are affixed, the work can then be presented to the bank which is designated thereon and the holder can receive cash to the extent of the value of the stamps. As a part of the method of doing business, the appellant has contractual relations with the bank and a sum of money available on deposit therein for the redemption of the works presented.

Although saving stamps are old in the art, this method of doing business was unique and original and resulted in a different use for savings stamps than had theretofore been made. No claim was made before the Trial Court nor is being made on appeal that the appellant has any monopoly as to said plan or scheme of doing business. The work covered by the statutory copyright is one of the steps in said method of doing business and as a specific step is entitled under the Copyright Laws of the United States to copyright protection.

It is the position of appellant that the work exemplified by Exhibit 1 to the complaint [R. 9] is a Book under the classification set forth in Section 5 of Title 17 USC and that the appellant has complied with the provisions of Sections 10 and 11 of said Title and has secured a statutory copyright upon said work and a registration of copyright for the same. The fact that there can be no monopoly under either the copyright or patent laws of the United States covering a method of doing business does not prevent the appellant from securing a valid statutory copyright upon a work which is one of the steps employed in performing said method.

Findings and Conclusions of the Trial Court.

Findings of fact and conclusions of law were approved by the Trial Court and filed on August 6, 1956 [R. 15-19]. The judgment appealed from, in accordance with the rules of the District Court for the Southern District of California, was a part thereof and was entered at the same time [R. 19-20].

Finding of Fact V [R. 17] states that the work exemplified by plaintiff's Exhibit 1 to the complaint is not

subject matter which can be covered by a statutory copyright pursuant to the provisions of Section 10, Title 17 USC. Conclusion of Law I [R. 18] is that plaintiff's original writing or work entitled "Cash Dividend Check Pay to the Order of" is not copyrightable subject matter under the Copyright Laws of the United States and Conclusions of Law II is that the complaint must be dismissed.

In Findings IV and VI [R. 16-17] the Court found the appellant had complied with the provisions of Title 17 USC in endeavoring to secure a copyright covering the work exemplified by plaintiff's Exhibit 1 to the complaint. The action was, therefore, dismissed solely upon the finding by the Court that the work which was the subject matter of the certificate of registration, plaintiff's Exhibit 3 to the complaint, was not subject matter which could be covered as a copyright under the Copyright Laws of the United States.

There was no mention in the findings, conclusions or judgment of any of the issues of infringement raised by the complaint and answer. Although the Court specifically refused to make such findings, nevertheless the Court indicated what such findings would be if included by stating [R. 66] that there was no question in his mind that the appellees had copied the work which was the subject matter of the certificate of copyright registration.

Questions On Appeal.

The questions presented by the appeal are:

1. Whether the work exemplified by Exhibit 1 to the complaint is copyrightable subject matter which can be protected under the provisions of Title 17 USC and par-

ticularly Section 10 thereof. Raised by points 1, 2 and 5 of appellant's concise statement of points under rule 17(6) [R. 68, 69] and by appeal from the judgment [R. 19].

2. Whether the work exemplified by plaintiff's Exhibit 2 to the complaint and defendants' Exhibit A [R. 57] embodies subject matter which is an infringement of the statutory copyright of appellant. Raised by points 3, 4 and 6 of appellant's concise statement of points under rule 17(6) [R. 69].

3. Whether the Trial Court erred in Finding of Fact IX [R. 18] that the action of appellees in publishing works as exemplified by Exhibit 2 to the complaint did not cause any damage or injury to the appellant. Raised by point 7 of appellant's concise statement of points under rule 17(6) [R. 69].

Specifications of Errors Relied Upon.

Appellant in its concise statement of points under rule 17(6) [R. 68, 69] has set forth the errors which it urges were committed by the Trial Court. Appellant relies on said errors as consolidated and restated herein in furtherance of the argument of the appeal as hereinafter presented:

1. The District Court erred in holding that the work exemplified by plaintiff's Exhibit 1 to the complaint was not copyrightable subject matter under the Copyright Laws of the United States (Finding V [R. 17], Conclusion I [R. 18], Judgment Par. 1 [R. 19]) because:

(a) Said work is a book as classified under Section 5 of Title 17 and contains original subject matter of the author.

(b) The provisions of Title 17 USC were complied with by appellant in securing the statutory copyright provided for in Section 10 thereof and securing the certificate of registration from the Register of Copyrights provided for in Section 11 thereof.

2. The District Court erred in failing to find and conclude that the work published by the appellees and exemplified by plaintiff's Exhibit 2 to the complaint and plaintiff's Exhibit 2 [R. 53] was an infringement of appellant's statutory copyright because:

(a) Said work of appellees was largely copied from appellant's statutory copyright as exemplified by plaintiff's Exhibit 1 to the complaint and contained subject matter which was original with appellant. The Trial Court, although admitting [R. 66] that the appellees copied the statutory copyright of appellant, nevertheless failed to make any finding or to enter any conclusion covering the issue of infringement.

Summary of Argument.

1. The work covered by appellant's statutory copyright is an original work properly classified as a book by the Register of Copyrights pursuant to the provisions of Section 5, Title 17, United States Code.

2. Having complied with the provisions of Sections 10 and 11 of said Title 17, the appellant is entitled to a copyright covering said original subject matter and to the protection accorded such copyright by the provisions of Title 17. The certificate of copyright registration issued by the Register of Copyrights was issued by said Register in performing his administrative functions under the Copyright Laws of the United States and the rules

of the Copyright Office and secures the claim to statutory copyright provided for by Section 10 of Title 17. The fact that the work covered by the statutory copyright is used as a step in a method of doing business does not prevent the original subject matter therein from being given protection by copyright under the provisions of Title 17.

3. Subdivision (a) of Section 5 of Title 17 USC is a catch-all section which is used by the Copyright Office to classify works which do not clearly fall under the other subdivisions of said section. Section 5 in fact specifically provides that other compilations shall be included in Section (a) and also provides at the end of said section that any error in classification shall not invalidate or impair the copyright protection secured by Title 17 and that the classification of works for registration as provided for in Section 5 shall not be held to limit the subject matter of copyright as defined in Section 4 of Title 17, said Section 4 providing that the works for which a copyright may be secured shall include all the writings of an author.

4. Having complied with the provisions of Title 17, the test of whether a work comprises copyrightable subject matter is whether it contains original writings of an author.

5. The publication of appellees, plaintiff's Exhibit 2 to the complaint, is an infringement of appellant's copyrighted work and this Court should determine the issue of infringement.

ARGUMENT.

Originality.

A copyright may be registered for a work of an author which is original, that is which owes its origin to the author, and such copyright is valid regardless of whether the subject matter of the copyright is novel. *Stein v. Mazer*, 204 F. 2d 472, affirmed 98 L. Ed. 630, 347 U. S. 201.

The originality which must reside in a work in order to secure the protection of statutory copyright must be original in that the author has created it by his own skill, labor and judgment. *Dorsey v. Old Surety Life Ins. Co.*, 98 F. 2d 872, C. C. A. Okla.

In a relatively recent decision the United States District Court for the Eastern District of Michigan, in *Gordon v. Weir et al.*, 111 F. Supp. 117, in determining whether an advertisement was the proper subject of copyright, held, p. 122, that such an advertisement which exhibited some original intellectual effort as to conception, composition and arrangement was copyrightable under the Copyright Statutes of the United States. In affirming this case on appeal, 216 F. 2d 508, the Court of Appeals for the Sixth Circuit held the copyright to be valid, stating that the District Court has correctly applied the law.

This Court in *Leon v. Pacific Telephone & Telegraph Co.*, 91 F. 2d 484 held a copyright on a telephone directory to be valid in that it contained original subject matter even though such originality consisted only in listing the names and telephone numbers of subscribers.

Similarly an alphabetical list of names and addresses of jewelers classified under different heads was held to be a valid copyright under Classification A of Section 5 of Title 17. *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 Fed. 83.

In *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F. 2d 35, the Court held that a combination and collection of matter forming a composite work from which a banker could ascertain at a glance practically all information pertaining to time on commercial paper was either a compilation or a book under the provisions of the Copyright Laws and was a valid copyright.

In *Gordon v. Weir*, *supra*, the subject matter sought to be protected by copyright consisted of an advertisement of a dot counting contest which portrayed merchandise given as a prize in a picture made up of a large number of dots, offering to the reader a main prize or prizes consisting of merchandise and a secondary prize consisting of credit checks applicable to the purchase price of the prize merchandise. This work was held to be a valid copyright under Class A-5 of Title 17 and to be infringed by the defendant.

The certificate of registration exemplified by plaintiff's Exhibit 3 to the complaint is *prima facie* evidence pursuant to the provisions of Section 209 of Title 17 as to the facts stated therein. Such facts are, as shown on said certificate, that the author was W. V. Mathews, that the copyright owner was the appellant herein, and that the work was published February 10, 1934. The appellees did not plead or prove the prior publication of any similar work. No attempt was made at the trial of the case to

prove that the work did not cover original subject matter of the author, other than the general contention that such a work was not subject to the Copyright Laws of the United States.

In *Remick Music Corporation v. Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523, affirmed 157 F. 2d 744, certiorari denied 91 L. Ed. 691, rehearing denied 91 L. Ed. 1296, where the defendants in an action for infringement of copyrights conceded the alleged authorship of the compositions in controversy and certificates of copyright registration were introduced in evidence and the defendants introduced no evidence on the subject of originality, the Court held that a *prima facie* case of originality and a valid copyright was made out. The holding in this case, which the Supreme Court of the United States did not deem worthy of review, is sufficient authority in and of itself to warrant this Court in reversing the judgment below.

The record, however, in this appeal shows affirmative testimony upon the question of originality and uniqueness. Mr. Bert Gordon of Denver, Colorado, President of the appellant, testified at the trial of the cause and his testimony is included in the record on appeal. Mr. Gordon is also President of Gordon Stores Co., Inc., a chain of department stores in Colorado, Texas and New Mexico [R. 25]. Gordon Stores Co., Inc. used the work covered by the copyright registration in its business because it was unique and original to them even though they had previously tried out various stamp plans of other concerns [R. 25]. Gordon Stores increased their volume of business forty percent within the first six months of usage of this work [R. 26].

The success of the use of the work in their stores caused Gordon Stores Co., Inc. to purchase the control of the plaintiff corporation in 1952 and to exploit the copyright thereafter [R. 26]. This exploitation was done by licensing distributors in various regions to use the copyright, including the licensed distributor in Southern California known as Check System Incorporated [R. 27]. This licensee is operating within the territory where the appellees are distributing and publishing the charged infringement. No attempt was made to dispute the testimony of Mr. Gordon either upon the question of the uniqueness or originality of appellant's copyrighted work or of the commercial success which flowed from the use of the same. If there were any such works in existence prior to the publication of appellant's work which were used in connection with saving stamps or any method of business using saving stamps, such evidence would undoubtedly have been presented to the Trial Court. The fact that the appellees have failed in any manner to attack the copyrighted work on the question of originality strengthens the position of the appellant on appeal that the Trial Court erred in finding that appellant's work did not contain copyrightable subject matter. Upon the evidence and the record before this Court such a finding could only be made upon the basis that the work *per se* contained no originality and was not copyrightable subject matter.

It is not contended by the appellant that the intellectuality necessary to compose appellant's work approached the intellectuality which would be necessary to compose and write a book upon a deep and abstruse scientific subject. However, the degree of intellectuality is not the test of originality, no more than the degree of an invention made

and covered by a patent is the test of whether an invention exists. If there is invention, a patent is valid regardless of the scope of the claims. If there is originality, a copyright is valid regardless of the degree of intellectuality necessary to compose the work covered by the copyright.

The Trial Court failed to apply the proper test in determining the question of validity of the copyright in issue. This Court in *Leon v. Pacific Telephone & Telegraph Co.*, *supra*, had no difficulty in holding the copyright therein valid and infringed and considering the same on its own merits as to originality regardless of whether it was used in the method of doing business which was carried on by the copyright owner, that is the business of conducting a telephone service. The Trial Court apparently confused the fact that a plan or scheme of doing business could not be protected with the fact that a work which was part of said scheme or plan could still be the subject of a valid copyright.

Reference to plaintiff's Exhibit 1 to the complaint will clearly show that it is not merely a check but that it is a work which contains unique and original subject matter and which is useful and was being used in connection with a stamp saving plan which, upon the record before the Court, was also unique and useful and has achieved commercial success even though in competition with other and numerous stamp saving plans.

It is submitted upon the question of validity that this Court should reverse the judgment of the Trial Court and should direct the Trial Court to enter a judgment determining that appellants' work as exemplified by Plaintiff's Exhibit 1 to the complaint contains copyrightable subject

matter and is a valid statutory copyright under the Copyright Laws of the United States. In so doing, this Court would be in accordance with the facts established by the record before the Court and the law cited herein pertaining to copyrights, including the decisions of this Court.

Infringement.

Although there is no finding or conclusion upon the issue of infringement, this Court has before it the alleged infringing publication of appellees as exemplified by Plaintiff's Exhibit 2 to the complaint [R. 10] and Plaintiff's Exhibit 2 [R. 53]. This Court is in as good or better position than the Trial Court to examine and determine the question of infringement. Under the authority of *Ry-Lock Company Ltd. v. Sears, Roebuck & Co.*, 227 F. 2d 615 (9 Cir.), this issue should be determined by this Court in the event that the judgment of the Trial Court is reversed upon the question of copyright validity without the necessity of sending the case back to the District Court for a determination of the issue of infringement. This particularly so in view of the statement of the Trial Court [R. 66] that there was no question in the Court's mind that the appellees had copied appellant's work for which a certificate of registration was issued by the Register of Copyrights.

The appellee, Leonard F. Davis, admitted [R. 48-49] that he had seen the work of the appellant prior to engaging in the alleged infringing activities and also had it available. He testified [R. 49-50]:

“Q. So that you had this check of the plaintiff corporation available at the time that you made up your check, is that correct? A. That’s right.

Q. As a matter of fact, you *practically* copied it, didn’t you? A. Well, yes, it is about the same. We didn’t try to copy it word for word. We used their idea.”

Having had access to the copyrighted work of the appellant and having practically copied it, as admitted, no attempt was made by the appellees to explain the similarities in the work exemplified by plaintiff’s Exhibit 1 to the complaint [R. 9] and the appellees’ alleged infringement plaintiff’s Exhibit 2 to the complaint [R. 10].

The test of infringement of copyright as laid down by this Court in *Harold Lloyd Corporation v. Witwer*, 65 F. 2d 1, at 18, is whether the copy comes so near to the original as to give every person seeing it the idea created by the original, citing *King Features Syndicate v. Fleischer*, 299 Fed. 533-535, and 13 *Corpus Juris* 1113, Section 276, note 30.

In referring to the *King Features Syndicate* case this Court quoted therefrom at page 19, the quotation in part reading:

“A copy is that which ordinary observation would cause to be recognized as having been taken from or the reproduction of another.”

The District Court in *Gordon v. Weir*, *supra*, cited this holding of the Court of Appeals for the Ninth Circuit at 111 Fed. Supp. 122 in rendering its decision that the

alleged infringement in said action was an infringement of the statutory copyright before the Court.

The similarities in appellant's copyrighted work and appellees' alleged infringement are such as to cause an ordinary observer to get the same idea from viewing it as said observer would have obtained by viewing the original and we are confident that this Court will get the same reaction from viewing the two works. Such reaction can only come from the fact that there are such similarities in the two works that the reaction is inevitable.

Appellant submits that the presence before this Court of the copyrighted work and the alleged infringing work of appellees, together with the fact that the appellees have admitted access to and copying of appellant's copyrighted work, that the appellees have made no explanation for the similarities in the two works and have used the same in their business for advertising purposes, fully justifies this Court in determining the issue of infringement on the record and holding that the appellees' alleged infringing work is an infringement of the valid copyright of appellant.

Conclusion.

Appellant submits that under the law cited herein and upon the record before this Court the judgment of the District Court holding that plaintiff's Exhibit 1 to the complaint did not contain copyrightable subject matter should be reversed and the Court below ordered to enter judgment that said statutory copyright is a valid copyright under the Copyright Laws of the United States.

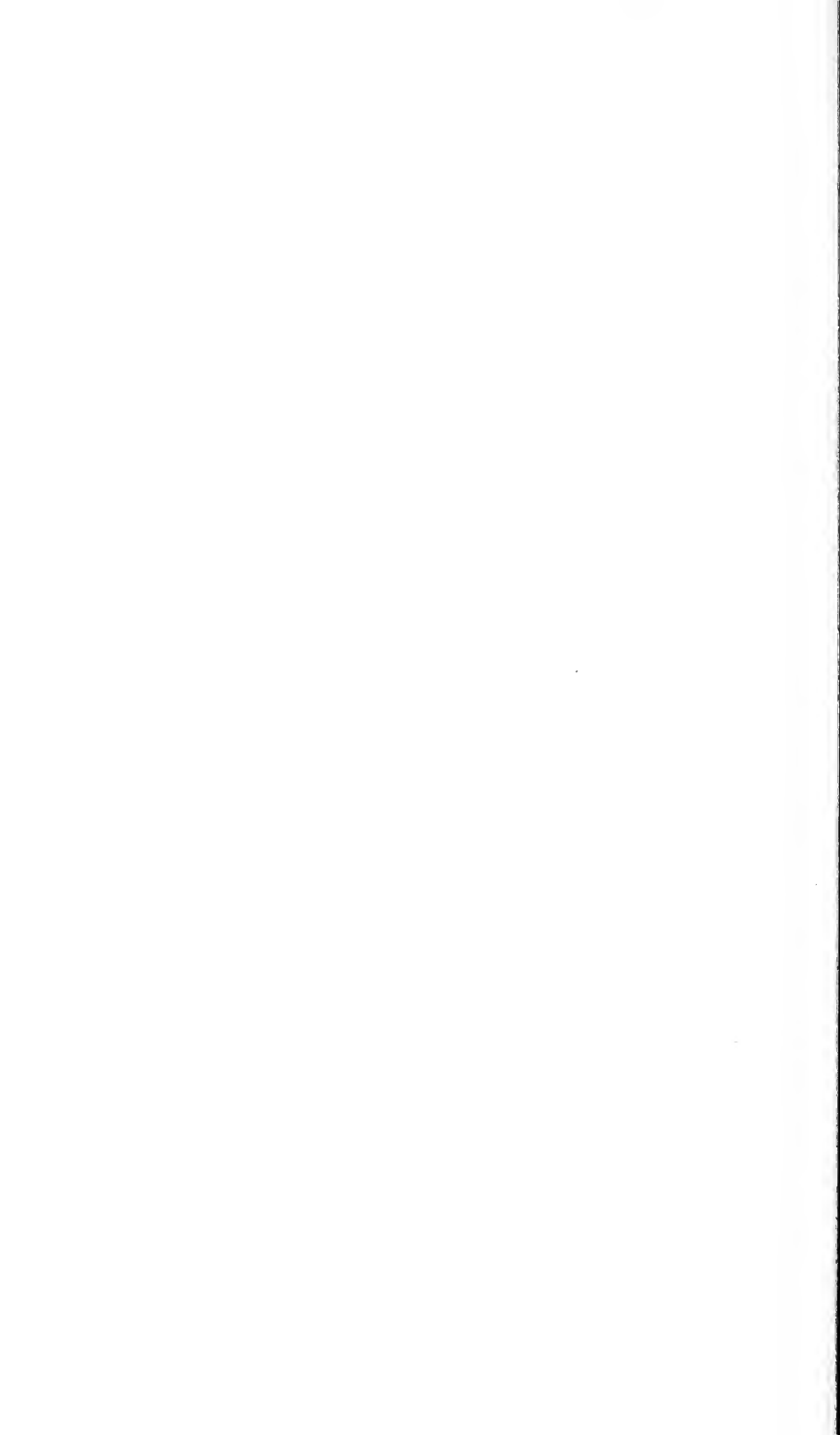
Appellant further submits that this Court should, having the record before it, determine the issue of infringement and hold that the alleged infringing work of appellees, exemplified by plaintiff's Exhibit 2 to the complaint, is an infringement of the statutory copyright of appellant and direct the District Court to enter a judgment in accordance with said holding.

Respectfully submitted,

LYON & LYON,

REGINALD E. CAUGHEY,

Attorneys for Appellant.



United States
Court of Appeals
for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,
Appellant,

vs.

SAFEWAY FURNITURE CO., INC., et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

DEC 14 1956

PAUL P. O'BRIEN, CLERK



No. 15294

United States
Court of Appeals
for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,
Appellant,

VS.

SAFEWAY FURNITURE CO., INC., et al.,
Appellees.

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Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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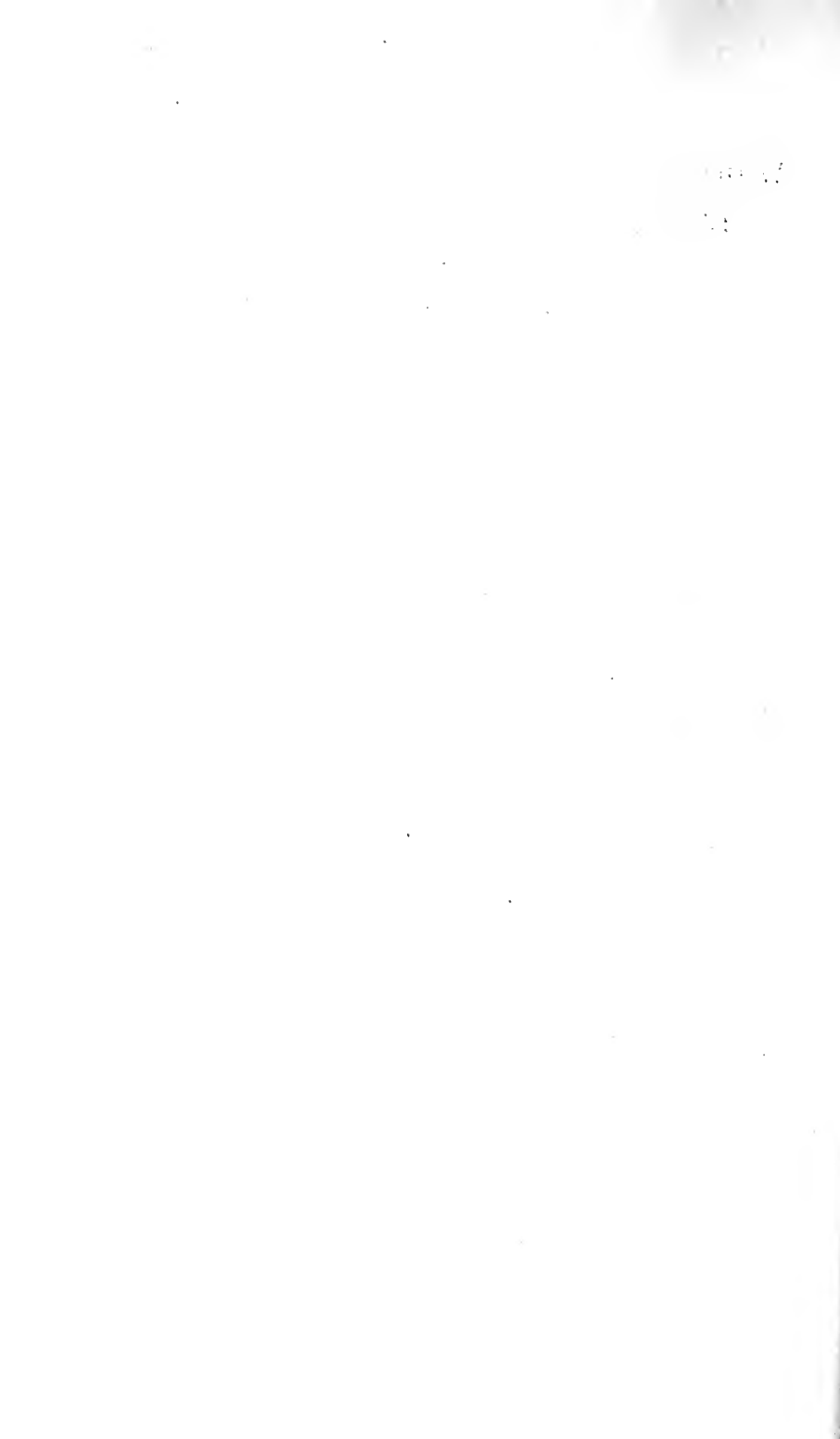
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In the United States District Court, Southern
District of California, Central Division

No. 17553—HW

SAFEWAY STORES, INCORPORATED,

Plaintiff,

vs.

SAFEWAY FURNITURE CO., INC., a Corporation;
SAFEWAY FURNITURE CO., a Co-Partnership;
MORRIS RUDNER, GERALD RUDNER, ROSE RUDNER,
MORRIS RUDNER, GERALD RUDNER and DOES I
THROUGH V, Inclusive, Co-Partners Doing
Business Under the Firm Name and Style of
SAFEWAY FURNITURE CO.; DOES I
THROUGH V, Inclusive,

Defendants.

CLAIM FOR PERMANENT INJUNCTION
AGAINST UNFAIR COMPETITION

Plaintiff complains of defendants, and each of
them, and for cause of action alleges that:

I.

Plaintiff is a corporation duly organized and
existing under and by virtue of the laws of the
State of Maryland and is a citizen of said State.

II.

Defendant, Safeway Furniture Co., Inc., is a
corporation duly organized and existing under and

by virtue of the laws of the State of California and is a citizen of said State. [2*]

III.

Plaintiff is informed and believes and therefore alleges that defendant, Safeway Furniture Co., is a co-partnership between defendant Morris Rudner, defendant Gerald Rudner and defendants Does I through V, inclusive.

IV.

Defendants Morris Rudner, Gerald Rudner and Rose Rudner, and each of them, are citizens of the State of California, residing in the Southern District of California, Central Division.

V.

Plaintiff does not know the true names or capacities (whether individual, associate, corporate or otherwise) of defendants Does I through V, inclusive, or any of them, and therefore sues said defendants, and each of them, by such fictitious names, and prays that their true names and capacities when ascertained may be incorporated herein by appropriate amendment hereto.

VI.

The jurisdiction of this Court is based upon diversity of citizenship, to wit, between the plaintiff, a corporation incorporated under the laws of the State of Maryland, and the defendants, each and all of the individual defendants being citizens of the

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

State of California, and defendant Safeway Furniture Co., Inc., being a corporation incorporated under the laws of the State of California. The amount in controversy, as hereinafter more specifically alleged, greatly exceeds the sum of \$3,000, exclusive of interest and costs.

VII.

For many years last past and continuously to date, plaintiff and its predecessors and affiliated corporations have been and now are engaged in operating a large number of retail stores, selling groceries, meat, produce, household supplies such as mops, brooms, furniture polish, floor wax, and expendable items that are used in maintaining a house, and in many of its stores it sells wines [3] and beers. In the United States, from 1926 to 1942, plaintiff owned a number of subsidiary corporations which, in turn, operated the retail stores. During the years 1941 to 1943, plaintiff acquired all of the assets, property and good will, including all rights to the trade names "Safeway Stores, Incorporated," "Safeway Stores" and "Safeway," contained in the operating businessess of all of said subsidiary corporations and since that time plaintiff itself has continuously operated the domestic stores. In the Dominion of Canada, plaintiff has operated continuously from 1929 to date through its wholly owned Canadian subsidiary, formerly named "Safeway Stores, Limited" and now named "Canada Safeway Limited."

VIII.

On June 10, 1944, plaintiff's trade name, "Safeway Stores, Incorporated," was deposited and recorded by plaintiff in the Trademark Division of the United States Patent Office under file No. 4953. Previously, on August 16, 1939, the same name of plaintiff's dissolved Nevada subsidiary was deposited and recorded by plaintiff in said Trademark Division under file No. 4220.

IX.

Plaintiff is qualified to do business in all forty-eight states of the United States and in the District of Columbia and the Territory of Alaska.

X.

As a result of plaintiff's methods of conducting its business and advertising and offering its goods and services for public sale, as hereinafter alleged, plaintiff's business has grown steadily. At the time of filing this action, plaintiff was, and for some time prior thereto had been, operating approximately 489 retail stores in the State of California, and approximately 1,867 retail stores throughout the United States. At said time, plaintiff's Canadian retail subsidiary, Canada Safeway Limited, was operating and now operates approximately 141 stores located in the provinces [4] of Alberta, British Columbia, Manitoba, Ontario and Saskatchewan. Plaintiff's retail stores in the United States are located in the States of California, Arizona, Arkansas, Colorado, Idaho, Iowa, Kansas, Maryland, Missouri, Montana,

Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington and Wyoming, and in the District of Columbia.

XI.

At the time of filing this action plaintiff was, and for some time prior thereto had been, operating approximately 282 stores in plaintiff's Los Angeles Distribution Division which extends from the Southern border of California to and including San Luis Obispo and Bakersfield on the north, said territory being hereinafter referred to as Southern California. Of said 282 stores operated in its Los Angeles Distribution Division, 175 are operated in the County of Los Angeles.

XII.

Since starting operations in the State of California, plaintiff, its affiliates heretofore referred to, and its predecessors in interest have consistently strived to maintain and have maintained a policy of giving a maximum of reliable service and selling the highest quality groceries and meats, produce, and household supplies at the lowest possible cost, and plaintiff has always used great care and gone to great expense in the selection of items of high quality, including numerous nationally known brands, in the marketing of said items at the lowest possible cost to the purchasers and in guaranteeing public satisfaction with all items purchased. Plaintiff in 1926 adopted the arbitrary, coined and distinctive

trade name "Safeway" for use by its affiliated retail stores and in its various advertisements. At the time of filing this action, plaintiff was, and for some time prior thereto had been, using the name of "Safeway" conspicuously in and around each of [5] its stores and the said name was and is printed in distinctive letters in an oblong sign and against a contrasting background.

XIII.

Plaintiff and its predecessors and affiliates have continuously used the word "Safeway" both alone and in combination with the words "Stores, Incorporated" and "Stores" and the said arbitrary, coined and distinctive trade name of "Safeway" now has and for many years last past has had a secondary meaning throughout the United States and Canada and especially in the State of California and in the County of Los Angeles and throughout Southern California as far as retail establishments are concerned, and the word "Safeway" is so understood by the purchasing public to be retail business carried on and conducted by plaintiff.

XIV.

In order to familiarize the consuming public with plaintiff's policy, as aforesaid, and thus to promote the business of plaintiff and its affiliates, plaintiff at all times mentioned herein has sought to make the name "Safeway" synonymous in the minds of purchasers with a reliable business which consistently gives purchasers outstanding dollar value. To

this end, plaintiff, from 1926, to date, has spent very large sums of money in extensively advertising and promoting said name as being synonymous with value and reliability in business. Plaintiff and its affiliates in the United States and Canada have expended a total of approximately \$92,942,471 since the year 1942, at a rate in excess of \$7,745,205 annually in advertising in newspapers, by radio, television broadcast, magazines, outdoor billboards, public carriers and other various advertising media, the business which it conducts and the goods and services which it offers for sale under its name "Safeway." The total amounts so expended by plaintiff and its affiliates in 1942 and succeeding years through 1953, and the portion of said amounts expended in the State of California, and in Southern California, were [6] as follows:

Year	Amount	Portion In California	Portion In Southern California
1942	\$ 4,431,442.06	\$ 954,000	\$ 468,000
1943	3,917,462.94	854,000	411,000
1944	4,454,950.99	977,000	475,000
1945	4,959,549.43	1,154,000	582,000
1946	5,258,370.16	1,186,000	595,000
1947	7,044,711.53	1,622,000	856,000
1948	6,517,417.21	1,797,000	957,000
1949	7,210,244.88	2,029,000	1,041,000
1950	9,278,988.90	2,287,000	1,273,000
1951	11,113,222.00	2,765,000	1,490,000
1952	13,181,660.00	3,184,000	1,760,000
1953	15,574,445.00	3,601,000	2,008,000
<hr/>			
Total advertising expenditures by plaintiff and its affiliates from 1942 through 1953.....	\$92,942,471.00	The portion thereof in California being: \$22,410,000	The portion thereof in So. Calif. being: \$11,916,000

XV.

As a result of plaintiff's vast expenditures, as aforesaid, in promoting the patronage of its business and the high quality of the merchandise it has sold and its manner and method of doing business, as hereinbefore alleged, large quantities of goods have been sold by plaintiff in the United States and Canada, and a substantial percentage of said sales has been made in the State of California and in Southern California.

XVI.

All of said advertising was and is intended, in connection with the quality of merchandise sold by it and its business methods, to and did and does build up and maintain and has built up and maintained the reputation, good will and value attached to plaintiff's [7] trade name "Safeway."

XVII.

The name "Safeway" is conspicuously displayed, in the manner herinbefore alleged, in, about and around each office, warehouse, and store operated by plaintiff in Southern California.

XVIII.

Retail sales by plaintiff and its affiliates during the calendar year 1953 were as follows:

Retail sales by plaintiff	
throughout the United	
States exceeded	\$1,578,400,000.00
Retail sales by Canada Safe-	
way Limited exceeded	118,780,000.00

Total retail sales in 1953
exceeded \$1,697,180,000.00

Plaintiff's retail sales in the State of California alone during the calendar year 1953 were approximately \$431,309,000 of which \$262,483,000 were made in Southern California.

XIX.

As a result of plaintiff's long and continued efforts to render its customers the best possible service and to sell them its goods at the lowest possible price, and its said advertising efforts, plaintiff and its affiliates have built up a reputation and good will for the name "Safeway" which is worth many millions of dollars to plaintiff. Computed conservatively according to well-recognized accounting principles consistently applied, said good will is valued at approximately \$75,000,000, and the goodwill value of the name "Safeway" in California alone is between \$20,000,000 and \$25,000,000.

XX.

At all times mentioned herein, plaintiff's method of conducting its business and selling its goods and services to the public in the manner hereinbefore alleged, and its advertising of the same under its said name of "Safeway" and its promotional sales work in the State of California and in Southern California has resulted, [8] as aforesaid, in the continued growth and expansion of its business. The aforesaid use of the trade name "Safeway" by plaintiff has been so extensive that at the time of

filing this action and for many years prior thereto the name "Safeway" had become well known to the purchasing public in said State of California and in Southern California as the commercial signature of a reliable retailer who sells products of a high quality at reasonable prices.

XXI.

Plaintiff's stock is listed on the New York, San Francisco and Los Angeles Stock Exchanges and is designated in daily published stock quotations under the name "Safeway Stores" or "Safeway." Due to the nature and extent of the business operations and advertising program of plaintiff, the name "Safeway" has become generally known throughout the United States, including all portions of California, as referring to plaintiff and to its business, and has acquired a synonymous and secondary meaning to the public generally and the citizens of all portions of the State of California, so as to have become associated with plaintiff and its business.

XXII.

Plaintiff is informed and believes and therefore alleges that the defendants, and each of them, at all times mentioned herein well knew and now know of plaintiff's substantial business and of the extensive use and advertising by plaintiff of the name "Safeway" as aforesaid, and well knew and now know of the rights of plaintiff in said name. Both the items sold by plaintiff as aforesaid and the items sold by defendants as hereinafter alleged are

used in the home and are often, if not always, purchased by the same class of consumers.

XXIII.

Plaintiff is informed and believes and therefore alleges that some time in April of 1953, or shortly prior thereto, the defendants Morris Rudner, Gerald Rudner, and Does I to V, inclusive [9] (hereinafter referred to as the "individual defendants"), became co-partners and began doing business under the firm name and style of "Safeway Furniture Co." at 6416 Van Nuys Boulevard, Van Nuys, California, and since said time said individual defendants and each of them under said name have been and are now operating a retail furniture store at said 6416 Van Nuys Boulevard, Van Nuys, California (said business being hereinafter referred to as the "partnership"). Plaintiff is further informed and believes and therefore alleges that on or about June 29, 1953, defendants Morris Rudner and Gerald Rudner and each of them caused to be filed with the County Clerk of Los Angeles County and published in said County a certificate that said defendants were transacting business under the fictitious name "Safeway Furniture Co."

XXIV.

Plaintiff is informed and believes and therefore alleges that on or about July 2, 1953, said individual defendants and defendant Rose Rudner purchased the assets of a retail furniture and appliance business located at 18567 Sherman Way, Reseda, Cali-

fornia, and that said business at the time of said purchase was being operated under the fictitious name and style of "Reseda Furniture Company." Plaintiff alleges that the store in which said business is located was in the same block as one of plaintiff's stores.

XXV.

Plaintiff is informed and believes and therefore alleges that shortly after making said purchase of the Reseda Furniture Company, said individual defendants and defendant Rose Rudner caused the defendant "Safeway Furniture Co., Inc." (hereinafter referred to as the "Furniture Corporation"), to be incorporated and that said individual defendants and defendant Rose Rudner were and are the sole and only stockholders of said Furniture Corporation. Plaintiff alleges that shortly after said incorporation the name of the "Reseda Furniture Company" was changed to "Safeway Furniture Co., Inc.," and [10] that the Furniture Corporation maintained and operated a retail furniture store at said location under said name until on or about January, 1954, when plaintiff is informed and believes and therefore alleges, all of the assets of the Furniture Corporation were sold by said Corporation and the purchaser thereof is now carrying on and conducting a retail business under the name of "Reseda Furniture Company."

XXVI.

Plaintiff is informed and believes and therefore alleges that at the present time and from and after

some time in January, 1954, the Furniture Corporation has not been actively engaged in the conducting of any retail or other business. Plaintiff is informed and believes and therefore alleges that said individual defendants and defendant Rose Rudner, who are the sole stockholders of said Furniture Corporation, and the said defendant Furniture Corporation intend shortly to resume business of the retail sale of furniture under the said name of "Safeway Furniture Co., Inc.," and unless enjoined by the decree of this Court will resume such business under said name.

XXVII.

Plaintiff alleges that at all times that the Furniture Corporation was conducting a retail furniture business in said Reseda, California, its methods of advertising and its use of the name "Safeway" were precisely the same as hereinafter alleged with respect to the conduct of the partnership by the individual defendants. Plaintiff alleges that all averments hereinafter with reference to the name of "Safeway" and the manner and method by which it is and has been used by said individual defendants in conducting the partnership, are intended to and do include the said Furniture Corporation during the period it conducted business under the name of Safeway Furniture Co. at 18567 Sherman Way, Reseda, California. [11]

XXVIII.

Plaintiff alleges that said individual defendants in adopting the name "Safeway Furniture Co." as

the name of the partnership, and in conducting and carrying on the partnership, and that the Furniture Corporation in adopting its name and while it conducted and carried on a store under said name at 18567 Sherman Way, Reseda, California, selected and used the name "Safeway," despite the many other names available to them, for the fraudulent and illegal purpose of competing unfairly with plaintiff and trading upon the name, good will and reputation established by plaintiff under the said name "Safeway," and with the intent and design to lead the public to believe that each of said respective stores was or is sponsored by or connected with the said plaintiff and to trade upon and profit from the name "Safeway" and from good will of and high reputation and standing of said plaintiff.

XXIX.

Plaintiff alleges that the advertising of said individual defendants and of the said Furniture Corporation while it was in business at Reseda was carried on and conducted in various advertising media in such a way as to convey the idea that sales made by it were connected with and sponsored by said plaintiff.

XXX.

Plaintiff alleges that in substantially all of the newspaper and other written advertising of said individual defendants and of said Furniture Corporation during the period it conducted the store at 18567 Sherman Way, Reseda, California, the name

“Safeway” was printed in large letters and the name “Furniture Company” in much smaller letters so as not to be easily discernible or attract attention. Plaintiff further alleges that in most, if not all, the printed advertising of the individual defendants and of the said Furniture Corporation while it was doing business at 18567 Sherman Way, Reseda, California, the name “Safeway” was the most prominent part of each [12] said advertisement; that said name was so used and displayed for the purpose and with the design of trading upon the name, reputation and standing of plaintiff; that in most of said advertisements the word “Safeway” was printed and copied in the block lettering used by the plaintiff; and that such manner and use of the name was designed to imitate and resemble plaintiff’s signs and lead defendant’s customers and the public to believe the defendants’ stores were in some way identified with and sponsored by plaintiff.

XXXI.

Plaintiff has heretofore demanded of defendants, and each of them, that they cease and desist from using the name “Safeway.” Notwithstanding such demand defendants and each of them have failed, neglected and refused to comply with such demand and have persisted in using, and the individual defendants now use, the name “Safeway” as aforesaid. Plaintiff is informed and believes and therefore alleges that the individual defendants, and each of them, intend to continue to use the name “Safeway” as aforesaid and otherwise and that the

defendant Furniture Corporation intends soon to resume the use of the name "Safeway" as aforesaid and otherwise, all to the irreparable damage and injury of plaintiff as hereinafter alleged.

XXXII.

Plaintiff is informed and believes and therefore alleges that the individual defendants, and each of them, did not and do not, and that the Furniture Corporation during the period it operated a retail store did not, maintain plaintiff's standards of conducting business or follow plaintiff's policies or render service to their consumers comparable to the service which plaintiff renders and that, unless defendants are enjoined from using the name "Safeway," many members of the purchasing public will believe that the standards of plaintiff's business conduct and the quality of plaintiff's goods or services has fallen through the neglect, inadvertence, incompetence or design of plaintiff, with great and irreparable injury and damage [13] to plaintiff and to the good will of the name "Safeway" far in excess of \$3,000.

XXXIII.

Plaintiff has no connection whatever with, and no control whatever over, the business of defendants, or any of them, or the advertising and other business methods employed by defendants. Plaintiff is informed and believes and therefore alleges that unless defendants, and each of them, are enjoined from using the name "Safeway" as aforesaid or otherwise or any other name confusingly similar

to plaintiff's trade name "Safeway," many members of the purchasing public will believe that plaintiff is identified or connected with or is sponsoring defendants, and each of them, to the great and irreparable damage and injury of plaintiff far in excess of \$3,000.

XXXIV.

Plaintiff alleges that it is irreparably damaged and injured far in excess of \$3,000 by the operation and conduct of any retail store under the name "Safeway" in a manner which leads the public to believe that plaintiff is sponsoring such retail store whether such operation and conduct is by the defendants, or any of them, or by any other person, firm or corporation. Plaintiff alleges that, by its efforts and the manner and method in which it has conducted its retail business and advertised its name "Safeway" as aforesaid, plaintiff has appropriated to itself the name of "Safeway" for all retail business. The defendants herein, and each of them, have adopted and used the said name and used it in the way and manner hereinbefore alleged for the sole purpose of trading upon the good will of said plaintiff and unjustly enriching themselves by so doing. Plaintiff alleges that its appropriation of the name of "Safeway" for retail sales as aforesaid is of the value of many million dollars to it and that the loss or the slightest impairment of plaintiff's exclusive right to said name "Safeway" for the purpose of retail [14] merchandising would damage it greatly in excess of the sum of \$3,000.

XXXV.

Plaintiff is informed and believes and therefore alleges that if the defendants, or any of them, continue to use the name "Safeway" for the purpose of retail selling, or if the defendant Furniture Corporation commences to use said name for said purpose, the purchasing public is likely to be confused and believe that the defendants or any other person, firm or corporation also using said name is affiliated with plaintiff or that plaintiff is connected with or sponsoring the use of said name, and that plaintiff would thereby be irreparably damaged and injured in an amount greatly in excess of \$3,000; and plaintiff alleges that it is without adequate relief except in this Court of Equity.

Wherefore, plaintiff prays:

1. That a permanent injunction issue restraining defendants, and each and all of them, and their respective officers, agents, servants, employees and attorneys, and all persons in concert or participation with them, or any of them, from in any manner using, leasing, selling, licensing or disposing of or permitting others to use for advertising or other purposes the names "Safeway Furniture Co." or "Safeway Furniture Co., Inc.," or any name including within it the name "Safeway," or any other name confusingly similar to plaintiff's trade name "Safeway," in any manner whatsoever in connection with the operation of the defendants' Safeway Furniture Co. or Safeway Furniture Co., Inc., or

in connection with the retail furniture business being conducted by defendants, or any of them, at 6416 Van Nuys Boulevard, Van Nuys, California, or any other retail furniture or other business whatsoever which any of said defendants may now or hereafter own or organize or in which any of them may own any proprietary interest; and

2. In the alternate that a permanent injunction issue [15] restraining defendants, and each and all of them, and each of their respective officers, agents, servants, employees and attorneys, and all persons in concert or in participation with them, or any of them, in any manner from using the word "Safeway," in imitation of or in any way or manner in which the plaintiff uses it or in the same lettering or form or resembling in any way the use of the said name by said plaintiff, or so as in any manner to indicate to any purchaser that the defendants, or any of them, or any establishment which they are conducting, is connected with or sponsored by the said plaintiff or from using any name similar to "Safeway" in such way or manner as to imitate the word "Safeway" or to intimate that defendants or any of them are in any manner connected with plaintiff; and

3. That plaintiff have and recover its costs herein incurred; and

4. For such other and further relief as to the Court may seem just and proper in the premises.

Dated: November 29, 1954.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ HENRY F. PRINCE,
Attorneys for Plaintiff.

[Endorsed]: Filed December 1, 1954. [16]

[Title of District Court and Cause.]

ANSWER

Come Now Defendants Safeway Furniture Co., Inc., a Corporation; Safeway Furniture Co., a Copartnership; Morris Rudner, Gerald Rudner and Rose Rudner individually; Morris Rudner and Gerald Rudner copartners doing business under the firm name and style of Safeway Furniture Co. and for answer to the complaint served upon them, admit, deny and allege:

I.

Admit all the allegations contained in Paragraph II.

II.

Admit that Safeway Furniture Co. is a copartnership between Morris Rudner and Gerald Rudner

but deny that defendants Does I through V, inclusive, are members of said copartnership.

III.

Admit each and every allegation contained in Paragraph IV. [17]

IV.

Deny, both generally and specifically, each and every allegation contained in Paragraph VI and deny that the amount involved exceeds the sum of \$3,000, and in this connection alleges that this Court does not have jurisdiction over the subject matter set forth in plaintiff's complaint.

V.

Deny that plaintiff has acquired all the rights to the trade name "Safeway."

VI.

Deny, both generally and specifically, each and every allegation contained in Paragraph XIII and in connection with said denial defendants allege that in the County of Los Angeles alone there are twenty-three "Safeway" listed in the Central Section of the Los Angeles telephone directory, five "Safeway" listed in the Southern Section, two "Safeway" listed in the Northeastern Section, seven "Safeway" listed in the Northwestern Section and three "Safeway" listed in the Western Section and that said "Safeway" refers to many different businesses carried on and conducted by per-

sons, firms and corporations other than the plaintiff herein.

VII.

In answer to Paragraph XIV, defendants allege that they too have sought to make the name "Safeway Furniture" synonymous in the minds of purchasers with a reliable business which consistently gives purchasers outstanding dollar value. To this end, defendants from April, 1952, to date have spent very large sums of money in extensively advertising and promoting the name of "Safeway Furniture" as being synonymous with value and reliability in the furniture business.

VIII.

In answer to Paragraph XXI defendants allege that the name "Safeway" has been and is currently used by divers persons, [18] firms and partnerships in many and varied businesses and is not particularly associated with plaintiff and its business.

IX.

In answer to Paragraph XXII, defendants deny that they well knew and now know of the rights plaintiff claims to have in the name "Safeway" and in that connection allege that plaintiff has no more rights to said name than any other person, firm or partnership.

X.

In answer to Paragraph XXIII, defendants allege that on February 25, 1949, a certificate of doing business under the fictitious firm name of

Safeway Furniture Co. at 8553 South Broadway, Los Angeles, was filed by one Pearl Levy and that thereafter and on or about June 22, 1950, a similar certificate was filed by Frank Kiefer and Sam Simms. That thereafter and on or about April 3, 1952, a certificate of a limited partnership was filed under the name of Safeway Furniture Co., Ltd., showing that the above-named Frank Kiefer and Sam Simms were limited partners, and Morris Rudner was the general partner of said Safeway Furniture Co., Ltd., doing business at 6416 Van Nuys Blvd. Thereafter and on or about June 29, 1953, Morris Rudner and Gerald Rudner caused a certificate to be filed in the office of the Clerk of the County of Los Angeles under the name of Safeway Furniture Co. at 6416 Van Nuys Blvd., Van Nuys, California. That thereafter and on or about June 4, 1954, Frank Kiefer filed a certificate with the Clerk of the County of Los Angeles showing that he was doing business under the fictitious firm name of Safeway Furniture Co. in Los Angeles, California.

XI.

In answer to Paragraph XXVI, defendants deny that the defendants either individually or as a corporation intend shortly or ever to resume business under the name Safeway Furniture Co., Inc. [19]

XII.

In answer to Paragraph XXVII, defendants allege that Safeway Furniture Co., Inc., has ceased

to do business and it is not intended that said corporation shall engage in any retail furniture business or in any other business at all.

XIII.

In answer to Paragraph XXVIII, defendants deny that the name Safeway Furniture Co., Inc., was adopted by the corporation for any fraudulent and illegal purpose at all and in this connection allege that the name Safeway Furniture Co., Inc., was adopted by the corporation because the principals thereof were the individuals who owned Safeway Furniture Co., a partnership, and in further connection with said paragraph, defendants deny both generally and specifically, each and every allegation contained in Paragraph XXVIII.

XIV.

In answer to Paragraph XXIX, defendants deny, both generally and specifically, each and every allegation contained therein.

XV.

In answer to Paragraph XXX, defendants deny, both generally and specifically, each and every allegation contained therein.

XVI.

In answer to Paragraph XXXI, defendants deny, both generally and specifically, each and every allegation contained therein and especially deny that the corporation intends to resume the use of the

name Safeway Furniture Co., Inc., either soon or at any time in the foreseeable future.

XVII.

In answer to Paragraph XXXIII, defendants deny each and every allegation contained [20] therein.

XVIII.

In answer to Paragraph XXXIII, defendants admit that plaintiff has no connection whatsoever with the business of the defendants but except as herein specifically admitted, deny each and every allegation contained therein.

XIX.

In answer to Paragraph XXXIV, defendants deny, both generally and specifically, each and every allegation contained therein and in this connection defendants specifically allege that they adopted the name Safeway Furniture Co. because that was the name of the furniture business in which they purchased an interest from the above-mentioned Frank Kiefer and Sam Simms in April, 1952.

XX.

In answer to Paragraph XXXV, defendants deny, both generally and specifically, each and every allegation contained therein and in this connection allege that the purchasing public is more intelligent than plaintiff would have this Court believe, and further allege that no customers of the defendants ever entered defendants' store believing they were

in a store owned, operated, sponsored, or in any way, shape, or manner, connected with the plaintiff.

Wherefore defendants pray that plaintiff's complaint be dismissed; that defendants have and recover their costs herein incurred; and that they have such other and further relief as may be fit and proper in the premises.

Dated: December 23, 1954.

/s/ WILLIAM B. MAGID,
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed December 23, 1954. [21]

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTS FOR ADMISSIONS

Plaintiff herein requests, in accordance with Rule 36 of the Federal Rules of Civil Procedure, that defendants, and each of them, admit that the facts and each of them hereinafter set forth are true. A response by defendants and each of them, to this request shall be made not later than 20 days subsequent to the date of service of this Plaintiff's Request for Admissions. The response requested is to be made in accordance with Rule 36 of the Federal Rules of Civil Procedure:

Request No. 1: Plaintiff was as of the date of the filing of the complaint herein and is now a cor-

poration duly organized and existing under and by virtue of the laws of the State of Maryland, and was as of that date and is now a citizen of the State of Maryland.

Request No. 2: Defendant Safeway Furniture Co., Inc., [23] was as of the date of the filing of the complaint herein and is now a corporation duly organized and existing under and by virtue of the laws of the State of California, and was as of that date and is now a citizen of the State of California.

Request No. 3: Defendant Morris Rudner was as of the date of the filing of the complaint herein and is now a citizen of the State of California.

Request No. 4: Defendant Gerald Rudner was as of the date of the filing of the complaint herein and is now a citizen of the State of California.

Request No. 5: Defendant Rose Rudner was as of the date of the filing of the complaint herein and is now a citizen of the State of California.

Request No. 6: Defendant Safeway Furniture Co., a co-partnership, was as of the date of the filing of the complaint herein and is now a citizen of the State of California.

Request No. 7: Plaintiff, its predecessors in interest, and wholly-owned subsidiaries have continually since 1926 used, throughout the County of Los Angeles, the word "Safeway" as their trade name or as the dominant portion thereof in connection with the operation of a chain of retail stores

throughout the County of Los Angeles selling groceries, meats and food produce. Continually since 1926 those retail stores in the County of Los Angeles have also vended a number of expendable household items such as mops, brooms, furniture polish and floor wax.

Request No. 8: On December 31, 1942, plaintiff acquired from its then wholly-owned subsidiaries, Safeway Stores, Inc., a [24] California corporation, and Safeway Stores, Inc., a Nevada corporation, all of their assets, including their retail grocery stores, their good will and their right to use the trade name "Safeway" in connection with the operation of retail grocery stores throughout the State of California and throughout the County of Los Angeles.

Request No. 9: Since 1926 and at least since prior to 1940 the trade name "Safeway," as used by plaintiff, its predecessors in interest, and wholly-owned subsidiaries, has acquired a secondary meaning in the County of Los Angeles as having reference to the retail business of the plaintiff, consisting of the operation of a chain of retail stores throughout of the County of Los Angeles selling groceries, meats, and food produce, and a number of expendable household items such as mops, brooms, furniture polish and floor wax.

Request No. 10: The word "Safeway" has become associated in the minds of the purchasing retail public with the plaintiff's retail stores, so that

when the word "Safeway" is used in the County of Los Angeles it is understood by the purchasing public to refer to the retail stores of the plaintiff and the retail merchandising operations conducted therein. Said association and understanding by the purchasing public has existed for many years and at least since prior to 1940 both as such retail stores have been operated by the plaintiff, by its predecessors in interest, and its former wholly-owned subsidiaries.

Request No. 11: Plaintiff, its predecessors in interest, and wholly-owned subsidiaries have continually since 1926 used, throughout the State of California, the word "Safeway" as their trade name or as the dominant portion thereof in connection with the operation of a chain of retail stores throughout the State of California selling groceries, meats and food produce. Continually since 1926, those retail stores in the State of California have also vended a number of expendable household items such as [25] mops, brooms, furniture polish and floor wax.

Request No. 12: Since 1926 and at least since prior to 1940 the trade name "Safeway," as used by plaintiff, its predecessors in interest, and wholly-owned subsidiaries, has acquired a secondary meaning in the State of California as having reference to the retail business of the plaintiff, consisting of the operation of a chain of retail stores throughout the State of California, selling groceries, meats and food produce, and a number of expendable house-

hold items such as mops, brooms, furniture polish and floor wax.

Request No. 13: The word "Safeway" has become associated in the minds of the purchasing retail public with the plaintiff's retail stores, so that when the word "Safeway" is used in the State of California it is understood by the purchasing public to refer to the retail stores of the plaintiff and the retail merchandising operations conducted therein. Said association and understanding by the purchasing public has existed for many years and at least since prior to 1940 both as such retail stores have been operated by the plaintiff, by its predecessors in interest, and its former wholly-owned subsidiaries.

Request No. 14: The matter contained in Exhibit "A" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on January 6 and January 13, 1955.

Request No. 15: The matter contained in Exhibit "B" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on January 20 and January 27, 1955.

Request No. 16: The matter contained in Exhibit "C" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements [26] appearing in the

Van Nuys News, a newspaper of general circulation, on February 3, 10, 17, 24 and March 3 and 10, 1955.

Request No. 17: The matter contained in Exhibit "D" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on October 27, November 3, 10, 17 and 24, 1955.

Request No. 18: The matter contained in Exhibit "E" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on August 18, 1955.

Request No. 19: The matter contained in Exhibit "F" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on August 25, 1955.

Request No. 20: The matter contained in Exhibit "G" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on September 1, 8, 15, 22 and 29, 1955.

Request No. 21: The matter contained in Exhibit "H" hereto is a true and correct copy, as to size,

contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on December 8, 15, 22 and 29, 1955.

Request No. 22: The matter contained in Exhibit "I" hereto is a true and correct copy, as to size, contents (except for the words "News, Van Nuys, Calif.—Thursday, Jan. 15, 1953" appearing at the top of the advertisement and the words "Received Jan 16 '53 PM" which appear at the bottom of the advertisement) and [27] relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on January 15, 1953.

Request No. 23: The matter contained in Exhibit "J" hereto is a true and correct copy, as to size, contents (except for the underlining of the word "Safeway's" appearing twice on the right-hand side of the advertisement and the circling of the word "Safeway" at the bottom of the advertisement) and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on October 2, 1952.

Request No. 24: The matter contained in Exhibit "K" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on August 20, 1953.

Request No. 25: The matter contained in Exhibit "L" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on August 27, 1953.

Request No. 26: The matter contained in Exhibit "M" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on November 16, 1952.

Request No. 27: The matter contained in Exhibit "N" hereto is a true and correct copy, as to size, contents (except for the circling of the words "Safeway's" twice on the left-hand side of the advertisement) and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on July 23, 1953. [28]

Request No. 28: The matter contained in Exhibit "O" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on December 1, 1955.

Request No. 29: The advertisements designated in each of the "Requests" numbered 14-28 above, and each of them, were inserted in the Van Nuys News at the instance and request of defendants,

Safeway Furniture Co., a partnership, Morris Rudner, Gerald Rudner and each of them. The format and composition of each of said advertisements was made up by the aforesaid defendants and each of them. The advertisements and each of them were paid for by the aforesaid defendants and each of them.

Request No. 30: The Van Nuys News is a newspaper currently published and vended three times weekly on each Tuesday, Thursday and Sunday. Said newspaper has been published and vended three times weekly on each Tuesday, Thursday and Sunday since October 3, 1955 and on each such publication date has been vended to the general public throughout the City of Van Nuys and generally throughout the San Fernando Valley west of Coldwater Canyon. Between October 1, 1952 and October 3, 1955, the Van Nuys News was published and vended twice weekly each Thursday and Sunday and has been vended on each such publication date to the general public throughout the City of Van Nuys and throughout the San Fernando Valley west of Coldwater Canyon.

Request No. 31: That the document attached hereto as Exhibit "P" is a true and correct copy of a letter received by Safeway Furniture Company, Inc., Morris Rudner, Rose Rudner and Gerald Rudner in October, 1953, from Norman S. Sterry.

Request No. 32: During the calendar year ended December 31, 1953, the retail sales by the plaintiff

throughout those states of the United States wherein it operated, amounted to [29] at least One Billion Five Hundred Seventy-eight Million Four Hundred Thousand Dollars (\$1,587,400,000.00). During the calendar year ended December 31, 1953, the retail sales by the plaintiff throughout California amounted to at least Four Hundred Thirty-one Million Three Hundred Nine Thousand Dollars (\$431,309,000.00). During the calendar year ended December 31, 1953, the retail sales by plaintiff throughout Southern California amounted to at least Two Hundred Sixty-two Million Four Hundred Eighty-three Thousand Dollars (\$262,483,000.00). During the calendar year ended December 31, 1953, retail sales by Canada Safeway, Ltd., a wholly-owned subsidiary of plaintiff operating in Canada, amounted to at least One Hundred Eighteen Million Seven Hundred Eighty Thousand Dollars (\$118,780,000.00). During the calendar year ended December 31, 1953, total retail sales by plaintiff and by Canada Safeway, Ltd., amounted to at least One Billion Six Hundred Ninety-seven Million One Hundred Eighty Thousand Dollars (\$1,697,180,000.00).

Request No. 33: The facts set forth in the affidavit of Drummond Wilde attached hereto as Exhibit "Q" are true.

Request No. 34: Since 1926 the name "Safeway," both alone and as the dominant part of the word "Safeway" combined with other words has been extensively advertised throughout Southern

California and Los Angeles County by plaintiff and the predecessors in interest of plaintiff as those predecessors are set forth in the affidavit of Drummond Wilde, attached hereto as Exhibit "Q." Said advertising has created in the minds of the public in Southern California and Los Angeles County, an association of the word "Safeway" with the retail stores operated by plaintiff and formerly by its predecessors in interest. This [30] association has existed at least since 1940.

Dated: March 14, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff.

[Endorsed]: Filed March 15, 1956.

[Title of District Court and Cause.]

STIPULATION ALLOWING AMENDMENT BY
INTERLINEATION TO COMPLAINT AND
ORDER OF COURT

It Is Hereby Stipulated and Agreed by and between Plaintiff and Defendants (other than De-

fendants Does), through their respective undersigned attorneys of record that the complaint of Plaintiff herein entitled "Claim for Permanent Injunction Against Unfair Competition" may be amended by interlineation in the following respects:

I.

In Paragraph XVIII of said Complaint the figure "\$1,578,400.00," appearing on line 10, page 7, may be interlined to read "\$1,578,400,000.00."

II.

In Paragraph XVIII of said Complaint the figure "\$118,780.00," appearing on line 12, page 7, may be interlined to read "\$118,780,000.00." [53]

III.

In Paragraph XVIII of said Complaint the figure "\$1,697,180.00," appearing on line 13, page 7, may be interlined to read "\$1,697,180,000.00."

It Is Further Stipulated and Agreed that the figures to be inserted by amendment are correct and that defendants do not desire to plead thereto.

Dated: May 15th, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,

JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff;

/s/ WILLIAM B. MAGID,
Attorney for Defendants.

Dated: May 15, 1956.

The above Stipulation is approved this 15th day of May, 1956, and it is ordered that the Provisions of Local Rule 4(d) are hereby waived and that the above-stipulated amendments shall be made by interlineation.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed May 15, 1956. [54]

[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas, there has previously been filed in this action on behalf of plaintiff "Requests for Admissions";

Whereas, said "Requests for Admissions" were filed on March 15, 1956;

Whereas, said "Requests for Admissions" were duly served upon defendants and each of them;

Whereas, at the deposition of Morris Rudner, commenced by plaintiff on March 22, 1956, the at-

torney of record for defendants read into the record his responses to said "Requests for Admissions";

Whereas, at said deposition the parties stipulated through their respective attorneys of record that the aforesaid responses would constitute the required responses to the "Requests for Admissions."

Now, therefore, It Is So Stipulated by and between the [55] plaintiff and all defendants other than defendants Does through their respective counsel, and it is further stipulated that the following were the responses so given.

Requests Nos. 1, 3, 4, 5, 7, 8, 14 through and including 28, 30, 32, 33. Defendants and each of them admit all of the matters stated or referred to in said request.

Request No. 2. Defendants and each of them admit the matters therein stated except that they and each of them deny that defendant, Safeway Furniture Co., Inc., is now a corporation duly organized or existing and further deny that said defendant is now a citizen of the State of California.

Request No. 6. Defendants and each of them admit the matters therein stated except that the defendants and each of them deny that Safeway Furniture Co., is now a co-partnership and that said co-partnership is now a citizen of the State of California.

Request No. 9. Denied.

Request No. 10. Denied.

Request No. 11. Defendants and each of them admit the matters therein stated except that they and each of them deny the last sentence thereof beginning on line 30 of Page 3 of said "Request for Admissions."

Request No. 12. Denied.

Request No. 13. Denied.

Request No. 29. Denied.

Request No. 31. Denied.

Request No. 34. Defendants and each of them admit the matters stated in the first sentence of said Request No. 34. Defendants and each of them deny the remainder of said [56] Request No. 34.

Dated: May 15, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff;

WILLIAM B. MAGID,
By /s/ WILLIAM B. MAGID,
Attorney for Defendants.

It Is So Ordered.

Dated May 15, 1956.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed May 15, 1956.

[Received in evidence as Plaintiff's Exhibit No. 8,
May 25, 1956.] [57]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated and Agreed by and between plaintiff and defendants (other than defendants Does), by and through their respective undersigned attorneys of record that the following facts are true and correct and, except as stated, shall be deemed fully established for purposes of trial in the above-entitled case without further proof or foundation.

I.

Total aggregate net sales of Safeway Stores, Inc., a Maryland corporation, and its subsidiaries during 1955, were \$1,932,243,202.00, which figure was an increase of \$118,726,566.00 over total aggregate net sales of Safeway Stores, Inc., and its subsidiaries during 1954. The above figures are for the calendar years mentioned. Objections to the relevancy and materiality of the foregoing are reserved. [58]

II.

Since at least as far back as July 1, 1926, and up through December 31, 1941, the predecessors in interest of plaintiff as those predecessors are set forth in the affidavit of Drummond Wilde, attached as Exhibit "Q" to plaintiff's Requests for Admissions filed in the above-entitled Court on March 15, 1956, incurred for each fiscal year as hereinbelow set forth, substantial advertising expenditures in Los Angeles County and throughout the counties comprising Southern California. These advertising expenditures have been in connection with the promotion of products in retail stores bearing the name "Safeway," which name has been featured in said advertisements. The following are the actual advertising expenditures for the years listed and for the counties hereinafter listed. A substantial portion of such expenditures, and at least 25% thereof were incurred advertising within Los Angeles County during each year hereinafter set forth.

1926—(7/1/26 to 12/31/26)	\$ 77,287.41
1927—(Calendar year)	162,441.15
1928— " "	159,014.92
1929— " "	215,421.23
1930— " "	300,784.46
1931— " "	239,888.55
1932— " "	276,880.75
1933— " "	288,180.28
1934— " "	199,156.52
1935— " "	202,605.77
1936— " "	268,651.60

1937—	“	“	.....	\$383,038.84
1938—	“	“	.....	295,959.38
1939—	“	“	.....	284,094.74
1940—	“	“	.....	317,014.16
1941—	“	“	.....	323,102.45

III.

The above advertising expenses were incurred in Los Angeles County, Orange County, Riverside County, Kern County, Santa Barbara County, Ventura County, San Bernardino County, San Luis Obispo County, Inyo County, and for the period from 1926 through 1931 in San Diego County also.

IV.

Since 1925, plaintiff and its predecessors in interest as those predecessors are set forth in the affidavit of Drummond Wilde, attached as Exhibit “Q” to plaintiff’s Requests for Admissions filed in the above-entitled court on March 15, 1956, regularly used and plaintiff now uses various media of advertising; that the most important of such media, at least from the standpoint of the amount of money expended has always been, and is, newspaper advertising; that other media of advertising regularly used ever since 1925 and still used, consist of billboard advertising, car-card advertising, magazine advertising, handbill advertising, circular or leaflet advertising and radio advertising; that after the advent of television, advertising by this medium has been regularly carried on; that all of said media have been used in California and elsewhere during

the periods above indicated and all of them are now used in California and elsewhere by the plaintiff. Since 1925, plaintiff and its predecessors in interest as above defined, have advertised in newspapers in the Los Angeles County metropolitan and in the San Francisco metropolitan area, and in many other areas of California, at least once a week and in some cases more often (except for brief periods when stores were closed because of work stoppages). Plaintiff at the present time regularly advertises in approximately 1,000 newspapers throughout the United States, including more than 200 in California. In said newspapers, advertisements are normally run at least once a week and in some cases more often. These 200 newspapers include [60] several newspapers published and distributed in the San Fernando Valley. Advertisements in newspapers published and distributed in the San Fernando Valley have been regularly carried by the plaintiff for a considerable number of years and at least as far back as 1940. In the newspaper advertising of plaintiff in California and elsewhere, and of its predecessors in interest as above defined, as each has advertised for the period above set forth, the word "Safeway" has appeared and now appears prominently in each advertisement. In some newspaper advertisements during the early 1930's, the word "Safeway" was used in connection with the word "Store" or "Stores." In the vast majority of such advertisements the word "Safeway" was used alone. Beginning at about 1940 and continuously ever since, the word "Safeway" alone has been

used. That in all other advertising, in addition to newspaper advertising, as above set forth, the word "Safeway" has been prominently used and, for the most part, only the word "Safeway" has been used in identifying plaintiff and its aforesaid predecessors in interest. In March, 1941, plaintiff and said predecessors in interests, adopted the policy that all company operated retail outlets should be operated under the name "Safeway" alone; that, thereafter, as soon as possible, all signs on stores and parking lots of plaintiff and said predecessors used only the word "Safeway."

V.

During the year 1950, plaintiff had nineteen (19) retail stores operating in the San Fernando Valley under the name of "Safeway." The number of such stores in the San Fernando Valley at present is twenty-three (23), which stores, and each of which, operate under the name "Safeway." Since at least as far back as the [61] year 1927, plaintiff and its predecessors in interest, as those predecessors are set forth in the affidavit of Drummond Wilde, attached as Exhibit "Q" to plaintiff's Requests for Admissions filed in the above-entitled court on March 15, 1956, have maintained a number of retail stores in the San Fernando Valley. In 1927, said number of stores was fourteen (14). Said stores have always borne the name "Safeway," either alone or in conjunction with the word "Stores" or "Stores, Inc." Since sometime in 1941, each of said stores operated in the San Fernando Valley has always borne the name "Safeway" alone.

Dated: May 15, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff;

WILLIAM B. MAGID,

By /s/ WILLIAM B. MAGID,
Attorney for Defendants.

It Is So Ordered.

Dated: May 15, 1956.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed May 15, 1956.

[Received in evidence as Plaintiff's Exhibit No.
10. May 25, 1956.] [62]

[Title of District Court and Cause.]

STIPULATION AND ORDER

Subject to its competency, relevancy and materiality, the plaintiff, at the request of the defendant Morris Rudner, stipulates with said defendant that the following facts are true and correct, and except

as hereinafter stated, shall be deemed to be fully established for the purpose of the trial in the above-entitled action without further proof or foundation:

I.

That since 1925 there have been approximately ninety-six (96) listings with the County Clerk of Los Angeles County of either fictitious or corporate names employing as part of the name the word [63] “Safeway” in conjunction with other words. That in many cases there has been more than one such listing by the same individual, individuals or corporation engaged in the particular business listing the name that includes the word “Safeway”; that the aforesaid ninety-six (96) listings include said duplications. Among those listed, with the dates on which the particular names were filed, are the following:

Safeway Stores, Inc.—February 24, 1925.

Safeway Stores Incorporated, a Nevada corporation—January 18, 1940.

Safeway Stores, Inc., of Nevada—June 2, 1941.

Safeway Stores, Incorporated, a Maryland corporation—April 14, 1943.

Safeway Furniture Co.—February 25, 1949.

Safeway Furniture Co., Ltd.—April 3, 1952.

Safeway Accident Insurance Associates—March 2, 1927.

Safeway Auto Driving System—March 6, 1934.

Safeway Auto Finance Co.—June 23, 1926.

Safeway Auto Parks—May 1, 1930.

Safeway Auto Sales—December 2, 1947.

Safeway Building Service—October 10, 1938.

Safeway Cab Co.—April 26, 1926.

Safeway Cleaners—January 26, 1932.

Safeway Cleaners & Dyers—April 4, 1925.

Safeway Cleaners & Dyers in Santa Monica—
October 25, 1928.

Safeway Construction Co.—December 9, 1937.

Safeway Drug Company—June 25, 1940.

Safeway Household Products—February 18,
1948.

Safeway Mattress Company—October 30, 1946.

Safeway Lock Co.—October 27, 1926. [64]

Safeway Rubber Co.—May 6, 1927.

Safeway Truck and Transfer Co.—January 21,
1927.

Safeway Service of Burbank—December 9,
1952.

Plaintiff does not stipulate to or admit the relevancy or the materiality of the foregoing or in any way stipulate that the fact that said names have been filed with the County Clerk of Los Angeles County in any way indicates or tends to prove that any business was conducted under any of said names or if any such business was ever started that it presently continues. The plaintiff expressly denies that such filings in any way tend to prove that any such business was ever actually conducted under any said name or names.

The first four names listed are those of the plaintiff or its predecessors in interest, and plaintiff suc-

ceeded to all rights of said predecessors in said names. The first one in point of time to file with the County Clerk of Los Angeles County under the name "Safeway" was plaintiff or one of its said predecessors in interest.

II.

The following listings appear in the 1955-1956 Los Angeles metropolitan area telephone directories, in addition to the listings of the plaintiff and defendants.

Central Section, published June, 1955:

Safeway Brake & Motor Service.

Safeway Brake Service.

Safeway Cleaners.

Safeway Finance Co.

Safeway Furniture (on South Broadway).

Safeway Heating Service, Inc.

Safeway Laundry.

Safeway Laundry and Cleaners.

Safeway Liquor Store.

Safeway Mattress Co.

Safeway Metal Polishing. [65]

Safeway Plumbing & Heating, Inc.

Safeway Sign Co.

Safeway Steel Scaffolds Div. of Safeway Steel Products, Inc.

Safeway Tire Service.

Safeway Van Lines.

Southern Section, published October, 1955:

Safeway Cleaners.

Safeway Driving Schools.

Safeway Payments Co.

Safeway Sign Co.

Northeastern Section, published December, 1955.

Safeway Electric Co.

Safeway Termite Control Co.

Northwestern Section, published March, 1956:

Safeway Motors.

Safeway Termite Control Co., Pasadena.

Western Section, published February, 1956:

None.

Plaintiff does not in any way stipulate that the listings or any particular listing indicates that there ever was or presently is any business being conducted under any of the above names; nor does plaintiff stipulate to the relevancy or the materiality of the above listings.

Dated: May 16th, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff; [66]

WILLIAM B. MAGID,
By /s/ WILLIAM B. MAGID,
Attorney for Defendants.

It Is So Ordered.

Dated: May 21, 1956.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed May 21, 1956.

[Received in evidence as Defendants' Exhibit B
May 25, 1956.] [67]

[Title of District Court and Cause.]

ORDER DISMISSING PARTIES

Whereas, the above-entitled cause regularly came on for trial on May 24, 1956; and

Whereas, plaintiff Safeway Stores, Incorporated, appeared by and through its attorney, Norman S. Sterry, Esquire; and

Whereas, defendants Safeway Furniture Co., Inc., a corporation; Safeway Furniture Co., a co-partnership; Morris Rudner, Gerald Rudner and Rose Rudner appeared through their attorney, William B. Magid, Esquire; and

Whereas, plaintiff, through its attorney, moved to dismiss as to all fictitious parties; and

Whereas, plaintiff, through its attorney, moved to dismiss without prejudice as to defendants Safeway Furniture Co., Inc.; Rose Rudner and Gerald Rudner; and

Whereas, the Court granted said motions in open Court;

Now, Therefore, It Is Hereby Ordered, [68] Adjudged and Decreed:

1. That defendants Does I through V are hereby dismissed from the above-entitled lawsuit;

2. Defendants Safeway Furniture Co., Inc.; Rose Rudner and Gerald Rudner are dismissed from said lawsuit without prejudice to plaintiff's right to renew the same.

Dated: June 6, 1956.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed June 6, 1956.

Docketed and entered June 11, 1956. [69]

[Title of District Court and Cause.]

MEMORANDUM OF OPINION

This is an action for unfair competition. Plaintiff is the owner and operator of a large chain of retail food and grocery stores. The stores sell groceries, meats, vegetables, incidental notions, kitchen hardware, et cetera. Plaintiff and plaintiff's predecessors since 1925 have been using the name "Safeway," and the name "Safeway" has attained a secondary meaning in the Southern California area as indicating a retail food and grocery store, oper-

ated by plaintiff organization. There is no question that in the minds of thousands of residents of Southern California the word "Safeway" means the Safeway retail grocery and food [70] stores operated by plaintiff.

Sometime prior to 1952 there had been organized and operated in Van Nuys, California, a small furniture store which was and is now known as Safeway Furniture Co., Inc. In April, 1952, defendant Morris Rudner purchased an interest in the Safeway Furniture Co., Inc., and one year later he bought out his co-owners, so that after April 1, 1953, he owned the Safeway Furniture Co., Inc., in Van Nuys in its entirety. Since that date he has conducted the business under the name of Safeway Furniture Co., Inc. He did not attempt to change the name, inasmuch as it would entail considerable expense to change the name, signs, stationery, et cetera, in connection therewith.

This action was filed on December 1, 1954. Plaintiff alleges unfair competition in the use of the name "Safeway." After an extensive hearing in this matter the Court will find the word "Safeway" has a secondary meaning in Southern California, including the Van Nuys area, but there is no evidence of any kind that defendant has attempted to trade upon the reputation and name of plaintiff.

The Court will also find there is no competition between the Safeway food markets and the Safeway furniture store. Although "Safeway" has a secondary meaning in Southern California and al-

though Van Nuys is a city within the area, nevertheless the Safeway organization of retail food and grocery stores does not have a Safeway store within the city limits of Van Nuys, the nearest being approximately two miles distant from the defendant's store. However, under present modern transportation facilities no doubt many persons living in Van Nuys patronize a Safeway food and grocery market outside the city limits. There is no evidence [71] in this case that there has been any confusion between the two stores, as no one testified they went into defendant's store thinking it was plaintiff's, or vice versa; and there has been no evidence that defendant at any time attempted to "palm off" any of his merchandise as being that of plaintiff.

It was plaintiff's original contention that it had the exclusive right to the use of the name "Safeway." Inasmuch as there was no evidence of competition or confusion between plaintiff and defendant the Court asked for memoranda of points and authorities relative to the right to restrain the use of the name in a non-competitive business. In its brief plaintiff now contends it can prevent any other retail establishment from using the word "Safeway," even though such establishment is not in direct competition with plaintiff.

The problem thus presented to the Court is rather simple—Can the plaintiff monopolize the word "Safeway" in relation to retail trade in Southern California in the absence of competition?

Plaintiffs has cited a number of authorities to the Court, among which is the case of *Phillips vs. The Governor & Co., etc.*, 79 F.2d 971, in which at page 974 the Court says:

“* * * defendant contends that there is no ‘competition’ between them, and therefore there can be no ‘unfair competition.’ This court, however, has carefully considered the question in *Del Monte Special Food Co. v. California Packing Corporation* (C.C.A.) 34 F.(2d) 774, and has held that the two products need not be competitive * * *” [72]

Plaintiff herein also relies upon a recent case of the Ninth Circuit, *North American Air Coach Systems, Inc., vs. North American Aviation, Inc.*, 231 F.2d 205. In that case the plaintiff claimed it had the sole and exclusive right to use the name “North American” in connection with airplanes and aviation. The Ninth Circuit points out that in the *North American* case there was overwhelming **proof of confusion** of source. Instances of actual confusion in the minds of the public were stacked high in the record. The trial court had also found the acts of defendant were designed, intended and calculated to cause confusion and had already misled numerous members of the general public.

In the case at bar the Court expressly finds there has been no confusion in the minds of the public between plaintiff’s food and grocery stores and defendants’ furniture store, and there is no evidence

that anyone has been misled because of similarity of the two names.

In the North American case, *supra*, the Ninth Circuit holds that plaintiff was entitled to the exclusive use of the term "North American" in the aviation industry. It certainly does not extend the exclusive use beyond the aviation industry. A casual examination of the Central Directory of the Los Angeles Telephone Exchange for June, 1956, indicates there are companies known as North American Accident Insurance Co., of Chicago, North American Car Corporation; North American Church Tenrikyo, North American Film Corporation, North American Industrial Engineers, Inc., et cetera. In fact, this directory gives the names of twenty-two companies using the words "North American" in their names. We cannot find in reading the North American Air Coach Systems, Inc., case, *supra*, that the Court held [73] plaintiff therein was entitled to the exclusive use of the name outside the aviation industry.

In the case at bar the Court is of the opinion plaintiff is entitled to protection of its name "Safeway" within the retail food and grocery industry in Southern California. The only question is whether defendant Safeway Furniture Co., Inc., comes within the area of protection. Although plaintiff and its predecessors have been using the name "Safeway" since 1925, nevertheless, over the years the name has been used many, many times in other businesses. In 1925 there was a "Safeway Cleaners

and Dyers”; in 1926 a “Safeway Auto Finance Co.” and a “Safeway Loan Company.” Since 1925 there have been approximately ninety-six listings with the County Clerk of Los Angeles County of fictitious or corporate names in which the name “Safeway” appears. An examination of the June, 1956, Central Directory of the Los Angeles Telephone Exchange indicates twenty firms now using the word “Safeway” in their titles.

Plaintiff contends there does not have to be competition between the parties. However, this Court is of the opinion that the statement made by the Ninth Circuit in the Phillips case, *supra*, has been modified by later decisions of that court. In *Robert C. Wian Enterprises, Inc., v. Persinger*, 229 F.2d 154 (in which this Court dismissed the complaint on the ground that it appeared from the records and files there was no competition between the parties) the Circuit reversed, stating:

“* * * There seems to be little likelihood of confusion of identity of products, but upon a trial there may be some proof of confusion of source that entitled plaintiff to some relief * * *” [74]

In *Fairway Foods v. Fairway Markets*, 118 F. Supp. 840, a case tried by this Court, the judgment was sustained by the Circuit—227 F.2d 193—which said, at page 196:

“The evidence without conflict supports the trial court’s finding that there has been no con-

fusion and that there is no likelihood of confusion because of the use by both parties of the word 'Fairway' * * * Perhaps the most important element of unfair trade is that there be competition in the sale of like merchandise and that there is, or is likelihood of, confusion as to which competitive article is being purchased * * *

In the case at bar the Court is of the opinion there is no competition between the parties hereto of like merchandise; there has been no confusion between the parties' products, and there is little likelihood of confusion so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store. We cannot agree with plaintiff that it is entitled to protection of the word "Safeway" in the entire retail business in Southern California. Its protection must be limited to the retail trade definitely connected and associated with sale of commodities usually found in a retail grocery and food store.

Judgment is ordered in favor of defendant herein, who is required to prepare findings of fact, conclusions of law and judgment in conformity herewith for presentation to the Court on or before June 29, 1956.

Dated: June 18th, 1956.

/s/ HARRY C. WESTOVER,

United States District Judge.

[Endorsed]: Filed June 18, 1956. [75]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above-entitled action, having duly come on for trial on May 24, 1956, before this Court, the Honorable Harry C. Westover, Judge Presiding; plaintiff appearing by Gibson, Dunn & Crutcher, by Norman S. Sterry; and defendants appearing by William B. Magid; and the cause having been continued for trial to May 25, 1956, before the same judge, and said cause having come to trial;

And the issues for trial having been joined upon the plaintiff complaint and amendment by interlineation to said complaint, the answer of all the named defendants; and the parties having stipulated to certain facts read into the record at the trial;

And the Court having heard and received evidence, both on the aforesaid complaint and on the answer thereto, including testimony of witnesses, the deposition of the defendant [76] Morris Rudner, exhibits and other evidence both oral and documentary;

And both sides having filed memoranda of law;

And the plaintiff, through its attorney, having moved to dismiss as to all fictitious parties and to dismiss without prejudice as to defendants Safeway Furniture Co., Inc., Rose Rudner and Gerald Rudner and said motion having been granted in open

Court and the defendants Does I through V, having been dismissed and the defendants Safeway Furniture Co., Inc., Rose Rudner and Gerald Rudner having been dismissed from said law suit without prejudice; and the cause having been submitted for decision; and the Court having under date of June 18, 1956, filed its Memorandum of Opinion ordering judgment for defendant Morris Rudner, and that Counsel for said defendant shall prepare findings of fact, conclusions of law and judgment in conformity with said memorandum of opinion for presentation to the court on or before June 29, 1956; and the Court being fully advised in the premises, makes its following

Findings of Fact

The Court finds that:

I.

It is true as alleged in Paragraph I of the complaint that plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland.

II.

It is true that Morris Rudner is a citizen of the State of California as alleged in Paragraph IV of said complaint.

III.

It is true that plaintiffs and its predecessors and affiliated corporations have, since 1925 been engaged as owners and operators of a large chain of retail food and grocery stores selling groceries, meats,

vegetables, incidental notions, kitchen hardware, et cetera. [77]

IV.

It is true as alleged in Paragraph XIII of plaintiff's complaint that the name "Safeway" has attained a secondary meaning in the Southern California area as indicating a retail food and grocery store operated by the plaintiff organization.

V.

It is true as alleged in Paragraphs XIV through XX that plaintiff corporation has expended large sums of money in advertising throughout the United States, Canada and especially in the State of California and Southern California and that as a result thereof the plaintiff has built up a valuable good will.

VI.

It is true as alleged in Paragraph XXI of plaintiff's complaint that the name "Safeway" has become generally known to the public and has acquired a secondary meaning in Southern California including the area in which the defendant is located as a food and grocery store.

VII.

It is not true that any of the defendants other than the defendant Morris Rudner is now operating a retail furniture store in Van Nuys, California.

VIII.

It is not true as alleged in Paragraph XXVI that the individual defendants or the corporate defend-

ant intend to resume business of the retail sale of furniture under the name of Safeway Furniture Co., Inc.

IX.

It is not true as alleged in Paragraph XXVIII that the individual defendants adopted the name "Safeway Furniture Co." but rather that the said defendant Morris Rudner purchased an interest in a then existing furniture company know as Safeway Furniture Co.; nor is it true that the defendants used the name Safeway Furniture Co. for the fraudulent and illegal purpose of competing unfairly [78] with plaintiff and trading upon the name, goodwill and reputation established by plaintiff but it is true that the defendant continued conducting the business under the name of Safeway Furniture Co. because, to change the name, would entail considerable expense since it would be necessary to change neon and electric signs, stationery, painting, et cetera. It is not true that the defendant used the name Safeway with the intent and design to lead the public to believe that his store was or is sponsored by or connected with the plaintiff and it is not true that the defendant intended to or is trading upon the goodwill and high reputation and standing of the plaintiff.

X.

It is not true, as alleged in Paragraph XXIX that the advertising of the defendant was carried on in such a way as to convey the idea that sales made by said defendant were connected with and sponsored by the plaintiff.

XI.

It is not true, as alleged in Paragraph XXX of the complaint that the written advertising of the defendants was so printed as to cause the word Safeway to be the most prominent part of such advertising; it is not true that said name was so used and displayed for the purpose of trading upon the name, reputation and standing of plaintiff nor is it true that defendants' customers and the public were led to believe that the defendants' stores were in some way identified with and sponsored by the plaintiff.

XII.

It is not true, as alleged in Paragraph XXXII that the defendant's use of the name Safeway Furniture Co., caused or will cause the public to believe that the standards of plaintiff's business conduct and the quality of plaintiff's goods or services have fallen or will fall through any act of the defendant. [79]

XIII.

It is not true that the use of the name Safeway Furniture Co. by the defendant for the purpose of selling of furniture at retail has confused, or is likely to confuse the minds of the public between plaintiff's food and grocery stores and defendants' furniture store and it is not true that anyone has been misled because of the similarity of the two names.

XIV.

It is not true that there is any competition between the plaintiff, Safeway Stores, Inc., and the defendant doing business as Safeway Furniture Co.

On the Basis of the Foregoing Findings of Fact,
the Court Reaches the Following

Conclusions of Law

I.

The Court has jurisdiction of the controversy as joined by the complaint and the answer thereto in that the plaintiff is a citizen of a different state from the state of citizenship of the defendants and the matter in controversy exceeds in value the sum of \$3,000, exclusive of interest and costs.

II.

Plaintiff has established a goodwill and secondary meaning for the name "Safeway" in the Southern California area as indicating a retail food and grocery store.

III.

As far as the buying public is concerned there is no confusion between the plaintiff's store and the defendants' store.

IV.

As far as the buying public is concerned there is no competition between the plaintiff and the defendants.

V.

As far as the buying public is concerned no one has been [80] misled because of the similarity of the name of the plaintiff and of the defendants' use of the name "Safeway Furniture Co."

VI.

Plaintiff has not been damaged by any of the acts, threatened acts or the use of the name Safeway Furniture Co. by the defendants.

VII.

Plaintiff is not entitled to an injunction against the defendants.

VIII.

Plaintiff is not entitled to any relief as against the defendants for unfair competition or at all.

IX.

Plaintiff is entitled to the protection of the word "Safeway" only insofar as it pertains to the retail trade definitely connected and associated with sale of commodities usually found in a retail grocery and food store.

X.

The Court hereby incorporates by reference in this paragraph, as a part of its findings of fact and conclusions of law, its memorandum of opinion dated June 18, 1956.

Based upon the foregoing Findings of Fact and Conclusions of Law the Court rendered its Judgment.

Dated this day of, 1956.

.....,

Judge of the United States
District Court.

Lodged June 27, 1956. [81]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND TO THE
FORM OF THE JUDGMENT

Comes Now the plaintiff and within the time allowed by the Rules of the Court and as extended by Stipulation approved by the Court, files this, its Objections to the Findings of Fact and Conclusions of Law, heretofore served upon it and objects to the proposed Findings of Fact and Conclusions of Law and to the form of the Judgment. Its objection to the form of the Judgment is that the same is not in accordance with Rule 7 of this Court as amended on December 22, 1955.

While the plaintiff does not believe that the evidence justifies Findings IX to XIV, inclusive, the Findings, other than Finding XIII, as drawn are in conformity with the views expressed by the Court in its Opinion directing that Judgment be entered for defendant. Plaintiff's objections, however, to the preceding Findings I to VIII are that they are not adequate and do not find on a number of facts which are established by uncontradicted evidence. The Memorandum [84] Opinion of the Court directs a judgment for the defendant solely upon the ground that there was no direct competition between the plaintiff and the defendant and that the plaintiff, therefore, cannot prevent the defendant from using the name "Safeway" as part of its name or advertising under the name of "Safeway." We believe

the Court recognized at the trial that the question is one of very great importance, not only to this plaintiff but to all retail establishments, and that the plaintiff expects to take an appeal from the Decree of the Court as soon as that Decree is made and entered. It will save a great deal of labor to counsel for both parties in writing their briefs if the facts which are undisputed and upon which the plaintiff-appellant relies, are clearly set forth in the Findings so that all that is necessary is to refer to the Findings rather than quote or cite the evidence. With that thought in view, we suggest the following amendments or enlargements to the Findings:

I.

Insert after Finding II a Finding to be numbered III as follows:

“That the action is between citizens of different States, to wit, the plaintiff a citizen of the State of Maryland and the defendant Morris Rudner a citizen of California. That the matter in controversy exceeds in value the sum of \$3,000.00, exclusive of interest and costs.”

Explanation: This is set out as the first Conclusion of Law, but plaintiff thinks it should be a direct Finding of Fact.

II.

We think Finding III should be redrafted (If the Court accepts our first suggestion, it will, of course, be numbered IV), as follows:

“It is true as alleged in said complaint that the plaintiff and its predecessors in interest [85] and affiliated corporations since 1925 have operated throughout California and in a large number of other States in the Union and in Canada a large chain of retail food and grocery stores in which it has sold groceries, meats, vegetables, incidental notions, kitchenware, furniture polish, floor wax and expendable items that are used in maintaining a house. In certain of its stores in Districts other than Los Angeles, plaintiff has sold various items of household furniture such as T.V. tables, hassocks, lawn chairs, dishes, glassware and other articles of tableware and other articles normally carried by the average furniture company, and plaintiff intends to extend the sale of such items to its stores in Los Angeles.”

III.

Redraft Finding IV to read as follows:

“That in 1926 plaintiff adopted as a trade name the word ‘Safeway’ for use by itself and its affiliated companies. For a short period plaintiff advertised under both the name of ‘Safeway’ and ‘Safeway Stores.’ That at the time of filing this action and ever since and for at least ten years prior to the opening of defendant’s store by defendant’s predecessors in interest, plaintiff has advertised extensively under the name ‘Safeway’ and the word ‘Safe-

way' has obtained a secondary meaning throughout the State of California, and especially in Southern California, as indicating the chain of stores operated by the plaintiff and the goods sold by it."

IV.

Add to Finding V: "of many millions of dollars." [86]

V.

We do not see the propriety of Finding VIII that the individual defendants and the corporate defendant do not intend to do business under the name of Safeway Furniture Co., Inc. The action was dismissed without prejudice as to all the defendants except Morris Rudner and as to Safeway Furniture Co., Inc. It does not seem to us appropriate, therefore, to have a Finding as to those defendants against whom the action is not now pending.

VI.

Redraft Conclusion of Law No. I as follows:

"The Court has jurisdiction of the above-entitled action."

All of the proposed enlargements of the Findings are in accordance with the undisputed evidence, and we therefore earnestly request that they be adopted by the Court.

VII.

We do not believe that Finding XIII is entirely in accord with the Memorandum of Opinion, and we suggest that if it be reworded as follows it will be

in strict accordance with the views of the Court expressed in its Opinion:

“It is not true that the use of the name Safeway Furniture Co. by the defendant for the purpose of selling of furniture at retail has confused the minds of the public between plaintiff’s food and grocery stores or any goods sold by plaintiff and defendant’s furniture store and it is not true that anyone has been misled because of the similarity of the two names, and there is little likelihood of confusion so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store.” [87]

While we believe that all of the foregoing proposed additions to the Findings are in conformity with the undisputed evidence, and that Finding XIII is in strict conformity with the views expressed by the Court at the trial and in its Memorandum of Opinion, we think that it would be helpful to the Court to have a redraft of the Proposed Findings and Conclusions embodying our proposed additions to the Findings with the proposed change in Finding XIII. We would have had such redraft accompany these Objections to the defendant’s proposed Findings except for the fact that the writer’s return from an out-of-town trip was delayed two days longer than anticipated, with the result that we might not be able to get the redraft completed today, the 12th, which is our time limit to file the objections. We will, however, hand to the Court either

today or tomorrow such redraft of the Proposed Findings of Fact and Conclusions of Law. In doing so, we wish it understood that we are not proposing such findings but are simply preparing the redraft so that the Court can have before it in one complete document the Findings of Fact and Conclusions of Law proposed by the defendant with the additions, amendments and changes which we have suggested. We do not, of course, concede that any of the findings proposed by the defendant and incorporated into the redraft are supported by the evidence, or that the findings as proposed by the defendant or as set out in the redraft are sufficient or will sustain a judgment in favor of the defendant or that the findings in the redraft, other than those which are proposed by the plaintiff as amendments, are supported by or in accord with the evidence.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER.

Of Counsel;

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed July 12, 1956. [88]

In the United States District Court, Southern
District of California, Central Division

No. 17553—HW

SAFEWAY STORES, INCORPORATED,

Plaintiff,

vs.

SAFEWAY FURNITURE CO., INC., a Corpora-
tion, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled action, having duly come on for trial on May 24, 1956, before this Court, the Honorable Harry C. Westover, Judge Presiding; plaintiff appearing by Gibson, Dunn & Crutcher, by Norman S. Sterry; and defendants appearing by William B. Magid; and the cause having been continued for trial to May 25, 1956, before the same Judge, and said cause having come to trial;

And the issues for trial having been joined upon the plaintiff's complaint and amendment by interlineation to said complaint, the answer of all the named defendants; and the parties having stipulated to certain facts read into the record at the trial;

And the Court having heard and received evidence, both on the aforesaid complaint and on the answer thereto, including testimony of witnesses,

the deposition of the defendant Morris [90] Rudner, exhibits and other evidence both oral and documentary;

And both sides having filed memoranda of law;

And the plaintiff, through its attorney, having moved to dismiss as to all fictitious parties and to dismiss without prejudice as to defendants Safeway Furniture Co., Inc., Rose Rudner and Gerald Rudner and said motion having been granted in open Court and the defendants Does I through V, having been dismissed and the defendants Safeway Furniture Co., Inc., Rose Rudner and Gerald Rudner having been dismissed from said lawsuit without prejudice; and the cause having been submitted for decision; and the Court having under date of June 18, 1956, filed its Memorandum of Opinion ordering judgment for defendant Morris Rudner, and that counsel for said defendant shall prepare Findings of Fact, Conclusions of Law and Judgment in conformity with said memorandum of opinion for presentation to the Court on or before June 29, 1956; and the Court being fully advised in the premises, makes its following

Findings of Fact

The Court finds that:

I.

It is true as alleged in Paragraph I of the complaint that plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland.

II.

It is true that Morris Rudner is a citizen of the State of California as alleged in Paragraph IV of said complaint.

III.

That the action is between citizens of different States, to wit, the plaintiff a citizen of the State of Maryland and the defendant Morris Rudner a citizen of California. That the matter in controversy exceeds in value the sum of \$3,000.00 [91] exclusive of interests and costs.

IV.

It is true as alleged in said complaint that the plaintiff and its predecessors in interest and affiliated corporations since 1925 have operated throughout California and in a large number of other States in the Union and in Canada a large chain of retail food and grocery stores in which it has sold groceries, meats, vegetables, incidental notions, kitchenware, furniture polish, floor wax and expendable items that are used in maintaining a house. In certain of its stores in Districts other than Los Angeles, plaintiff has sold various items of household furniture such as T.V. tables, hassocks, lawn chairs, dishes, glassware and other articles of tableware.

V.

That in 1926 plaintiff adopted as a trade name the word "Safeway" for use by itself and its affiliated companies. For a short period plaintiff advertised under both the name of "Safeway" and "Safeway Stores." That at the time of filing this action and

ever since and for at least ten years prior to the opening of defendant's store by defendant's predecessors in interest, plaintiff has advertised extensively under the name "Safeway" and the word "Safeway" has obtained a secondary meaning throughout the State of California, and especially in Southern California, as indicating the chain of stores operated by the plaintiff.

VI.

It is true as alleged in Paragraphs XIV through XX that plaintiff corporation has expended large sums of money in advertising throughout the United States, Canada and especially in the State of California and Southern California and that as a result thereof the plaintiff has built up a valuable good will of many millions of dollars. [92]

VII.

It is true as alleged in Paragraph XXI of plaintiff's complaint that the name "Safeway" has become generally known to the public and has acquired a secondary meaning in Southern California including the area in which the defendant is located as indicating a chain of food stores operated by plaintiff.

VIII.

It is not true that any of the defendants other than the defendant Morris Rudner is now operating a retail furniture store in Van Nuys, California.

IX.

It is not true as alleged in Paragraph XXVIII that the individual defendants adopted the name

“Safeway Furniture Co.” but rather that the said defendant Morris Rudner purchased an interest in a then existing furniture company known as Safeway Furniture Co.; nor is it true that the defendants used the name Safeway Furniture Co. for the fraudulent and illegal purpose of competing unfairly with plaintiff and trading upon the name, good will and reputation established by plaintiff, but it is true that the defendant continued conducting the business under the name of Safeway Furniture Co. because, to change the name, would entail considerable expense since it would be necessary to change neon and electric signs, stationery, painting, et cetera. It is not true that the defendant used the name Safeway with the intent and design to lead the public to believe that his store was or is sponsored by or connected with the plaintiff and it is not true that the defendant intended to or is trading upon the good will and high reputation and standing of the plaintiff.

X.

It is not true, as alleged in Paragraph XXIX that the advertising of the defendant was carried on in such a way as to convey the idea that sales made by said defendant were connected [93] with and sponsored by the plaintiff.

XI.

It is not true, as alleged in Paragraph XXX of the complaint that the written advertising of the defendants was so printed as to cause the word Safeway to be the most prominent part of such advertis-

ing; it is not true that said name was so used and displayed for the purpose of trading upon the name, reputation and standing of plaintiff nor is it true that defendants' customers and the public were led to believe that the defendants' stores were in some way identified with and sponsored by the plaintiff.

XII.

It is not true, as alleged in Paragraph XXXII that the defendants' use of the name Safeway Furniture Co. caused or will cause the public to believe that the standards of plaintiff's business conduct and the quality of plaintiff's goods or services have fallen or will fall through any act of the defendant.

XIII.

It is not true that the use of the name Safeway Furniture Co. by the defendant for the purpose of selling of furniture at retail has confused the minds of the public between plaintiff's food and grocery stores or any goods sold by plaintiff and defendants' furniture store and it is not true that anyone has been misled because of the similarity of the two names, and there is little likelihood of confusion so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store.

XIV.

It is not true that there is any competition between the plaintiff Safeway Stores, Incorporated and the defendant doing business as Safeway Furniture Co.

On the Basis of the Foregoing Findings of Fact,
the [94] Court Reaches the Following

Conclusions of Law

I.

The Court has jurisdiction of the above-entitled action.

II.

Plaintiff has established a good will and secondary meaning for the name "Safeway" in the Southern California area as indicating a retail food and grocery store.

III.

As far as the buying public is concerned, there is no confusion between the plaintiff's store and the defendants' store.

IV.

As far as the buying public is concerned, there is no competition between the plaintiff and the defendants.

V.

As far as the buying public is concerned, no one has been misled because of the similarity of the name of the plaintiff and of the defendants' use of the name "Safeway Furniture Co."

VI.

Plaintiff has not been damaged by any of the acts, threatened acts or the use of the name Safeway Furniture Co. by the defendants.

VII.

Plaintiff is not entitled to an injunction against the defendants.

VIII.

Plaintiff is not entitled to any relief as against the defendants for unfair competition or at all.

IX.

Plaintiff is entitled to the protection of the word "Safeway" only insofar as it pertains to the retail trade definitely [95] connected and associated with sale of commodities usually found in a retail grocery and food store.

X.

The Court hereby incorporates by reference in this paragraph, as a part of its Findings of Fact and Conclusions of Law, its Memorandum of Opinion dated June 18, 1956.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that:

I.

Plaintiff shall take nothing by its complaint, or at all.

II.

Defendants and each of them shall recover from plaintiff and plaintiff is ordered to pay, the costs of defendants in the sum of \$.

III.

The Clerk is directed to enter the foregoing Judgment.

Dated: This 24th day of July, 1956.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

It Is Stipulated that the foregoing Findings of Fact and Conclusions of Law and Judgment are approved by both parties as to form and are a true and correct transcription of the Findings of Fact and Conclusions of Law as directed by the Court after hearing arguments on the objections of plaintiff to the proposed [96] Findings of Fact and Conclusions of Law drafted by defendant.

Dated: July 24, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff Safe-
way Stores, Incorporated.

/s/ WM. B. MAGID,
Attorney for Defendants.

[Endorsed]: Filed July 24, 1956.

Docketed and entered July 24, 1956. [97]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff above-named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of the above-entitled Honorable United States District Court, Southern District of California, Central Division, entered and docketed in this action on July 24th, 1956, and from the whole of said Judgment.

Dated this 13th day of August, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff Safe-
way Stores, Incorporated.

Affidavit of service by mail attached.

[Endorsed]: Filed August 13, 1956. [98]

[Title of District Court and Cause.]

PETITION FOR AND EX PARTE ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING THE APPEAL

Whereas Notice of Appeal in the above-entitled matter was filed on behalf of plaintiff on August 13, 1956;

Whereas on the same date an undertaking for cost bond on appeal was filed;

Whereas on August 16, 1956, a Designation of Contents of Record upon Appeal was filed on behalf of plaintiff;

Whereas the forty day period within which the record on appeal must be filed with the Appellate Court and the appeal there docketed expires on September 22, 1956, under Rule 73(g) of the Federal Rules of Civil Procedure.

Whereas the clerk's office of this United States District Court has advised Counsel's Office that he may be unable to complete the record on appeal and file the same and docket the same with the Appellate Court by said date of September 22, 1956;

Now Therefore, it is respectfully petitioned that this honorable court extend the time within which the record on appeal may be filed with the Appellate Court and the appeal there docketed for an additional period of 10 days.

Dated: September 21, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff-Appellant Safeway Stores,
Incorporated.

Pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, it is hereby ordered that the period within which the record on appeal in the above matter may be filed with the Appellate Court and the appeal there docketed shall be extended for an additional period of 10 days in addition to the 40 day period provided in said Rule 73(g).

Dated: September 21, 1956.

/s/ HARRY C. WESTOVER,
Judge, United States District
Court.

[Endorsed]: Filed September 21, 1956.

In the United States District Court, Southern
District of California, Central Division

No. 17553—HW Civil

SAFEWAY STORES, INCORPORATED,

Plaintiff,

vs.

SAFEWAY FURNITURE CO., INC., a Corpora-
tion, et al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding

Thursday, May 24, 1956

Appearances:

For the Plaintiff:

GIBSON, DUNN & CRUTCHER, by
NORMAN S. STERRY, ESQ., and
M. E. WHALEN, ESQ.

For the Defendants:

WILLIAM B. MAGID, ESQ.

Thursday, May 24, 1956—2:00 P.M.

The Clerk: No. 17553—HW Civil, Safeway
Stores, Incorporated, vs. Safeway Furniture Co.,
Inc., et al., trial.

Mr. Sterry: Ready for the plaintiff.

Mr. Magid: Ready for the defendant, your
Honor.

The Court: I have read your pleadings and your stipulation, and so you can call your first witness.

Mr. Sterry: If your Honor please, in this case I am doing nothing I haven't done in any case. I always prepare a trial brief, which has no argument, simply the rules that are relied on, and a digest and quotation of cases supporting those rules. I have sent a copy to Mr. Magid, and I am handing a copy to your Honor.

The Court: I would be happy to read it.

Mr. Sterry: I don't mean that your Honor should read it because many of the questions may not arise, but that is always my custom.

If your Honor please, because of not getting to trial on Monday, and I trust your Honor will not consider that I had the slightest criticism of the court for that, because I have been around too long to think that you can control that, but some of my witnesses have made other arrangements, so I will have to put them on a little out of order.

The Court: That is perfectly all right with me. [3*]

Mr. Sterry: Mr. Bauer.

ROBERT J. BAUER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Robert J. Bauer, B-a-u-e-r.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Robert J. Bauer.)

Mr. Sterry: Before I examine the witness, I want to dismiss as to the fictitious defendants.

The Court: They may be dismissed.

Mr. Sterry: And if Mr. Rudner testifies to the same facts that he has in his deposition, I shall probably move to dismiss as to all other defendants without prejudice, but I want to withhold that motion until we have Mr. Rudner's testimony.

The Court: The fictitious defendants may be dismissed.

Direct Examination

By Mr. Sterry:

Q. Mr. Bauer, state your name, please, for the reporter. A. Robert J. Bauer.

Q. Where do you live, Mr. Bauer? [4]

A. 10995 Robling.

Q. In Los Angeles? A. Yes.

Q. Mr. Bauer, where is your place of business?

A. 724 South Spring Street.

Q. Mr. Bauer, are you connected with any organization?

A. I am president of the Better Business Bureau.

Q. I have no doubt that the court knows generally, Mr. Bauer, what that is. Will you keep your voice up just a little bit, Mr. Bauer?

A. Sure.

Q. I have no doubt that the court knows of the——

(Testimony of Robert J. Bauer.)

The Court: Yes, I know the Better Business Bureau and what they are trying to do.

Mr. Sterry: For the record, your Honor, I would like just as briefly as possible to have it.

Q. Just state generally what the function of that bureau is.

A. It is to promote truth in advertising and to fight commercial fraud.

Q. It is a non-profit corporation?

A. Yes, non-profit corporation, maintained in Los Angeles by about 2,300 business firms.

Q. Of all varieties? A. Yes. [5]

Q. Retail and wholesale?

A. Retail, wholesale.

Q. Financial? A. Yes.

Mr. Magid: If your Honor please, of course, this is not too important, but I object to Mr. Sterry's testifying unless he takes the witness stand.

The Court: There is no question about what the Better Business Bureau does. I don't know if it has anything to do with this case or not.

Mr. Sterry: If your Honor please, it simply qualifies the witness. I have to make a record here.

The Court: Well, you go ahead. Proceed.

Q. (By Mr. Sterry): Mr. Bauer, how long have you been connected with the Better Business Bureau Association?

A. I have been the executive head of this Bureau since 1930. Prior to that I was with the Detroit Better Business Bureau.

(Testimony of Robert J. Bauer.)

Q. How long have you been president of it?

A. I have been president for about six years.

Mr. Sterry: Counsel, speaking about leading, I was simply trying to get through as shortly as I could.

Q. You say it is in everything. How do you do this? Is it on complaints of people or on your own or what?

Mr. Magid: If your Honor please, the defendant objects [6] to Mr. Sterry leading the witness.

The Court: Overruled.

The Witness: The Better Business Bureau investigates advertising and selling claims on its own, and also as a result of complaints received from the public and from competitive business firms.

Q. (By Mr. Sterry): As president of that, do you have to keep in touch with the general way and method of conduct of retail and wholesale businesses?

A. Yes, we do.

Q. And the general trend of advertising?

A. Yes.

Q. General effect on the public?

A. That's right.

Q. Now, I don't know whether my client, Safeway Stores, Incorporated, is a member of that bureau or not. Is it?

A. It is.

Q. Do you know whether the defendant, Safeway Furniture Company in Van Nuys, is?

A. I think it is not, but frankly I didn't check. I am pretty sure they are not.

Mr. Sterry: May we have a stipulation, counsel,

(Testimony of Robert J. Bauer.)

that as long as the two firms have the word Safeway, that I may refer to the plaintiff as Stores, Incorporated, and your company as the defendant, and it will be so understood, unless [7] we want to make it more specific.

Mr. Magid: Why not refer to them as plaintiff and defendant, or as Stores and Furniture, and then we will know exactly what we are talking about.

Q. (By Mr. Sterry): Have you any personal interest yourself in the result of the outcome of this lawsuit? A. I have not.

Q. Do you know of your own knowledge, confining it to this vicinity, Los Angeles County, whether the plaintiff, Stores, Incorporated, has used any one word or insignia as advertising?

A. I know for many years their signature on their advertising has been just simply Safeway.

The Court: Isn't that in the stipulation? That is in your stipulation. You don't have to prove anything you stipulated to, do you?

Mr. Sterry: No, but counsel has asked us to stipulate. It is not in the record. I think from conversations that he intends to prove there are a number of other concerns that use the word Safeway in their firm name.

Q. In all your business or transactions, have you ever known of any other concern than the plaintiff that has been known by that single word, Safeway?

A. Not that I recall, although I know the name

(Testimony of Robert J. Bauer.)

Safeway has been used in a few instances, but I know none where it [8] has been used by a retail store here.

Q. In all your experience, do you know of any other concern that has attempted to advertise as Safeway? A. No.

Mr. Sterry: Now, I think the advertisement in the papers speaks for itself, but I will not ask counsel to stipulate, because we can prove it.

The Court: If you are going to use that, have it marked for identification.

Mr. Sterry: Yes, if your Honor please.

The Court: It may be marked Plaintiff's Exhibit 1 for identification.

The Clerk: Exhibit 1 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 1 for identification.)

The Court: The chances are, if you will show those newspapers to opposing counsel, he will stipulate that is an ad put in the newspaper on that date by the plaintiff.

Mr. Sterry: As your Honor suggests, I will show these three and ask counsel if he will so stipulate.

The Court: A newspaper ad speaks for itself. They have got the ad there and the date. I don't know why you can't stipulate that appears in the newspaper.

Mr. Sterry: If your Honor please, I believe it is admissible without identification, but as I can

(Testimony of Robert J. Bauer.)

prove it is, [9] if they don't admit it, I never try to argue law points.

The Court: Just be quiet and they will admit. Counsel, won't you stipulate?

Mr. Magid: Certainly, your Honor. I will be glad to.

The Court: That's what I thought.

Mr. Magid: I am under the impression that you are just offering the three top sheets. Is that correct, Mr. Sterry? Or shall we go into all of these?

Mr. Sterry: I am offering the top sheet with the advertisement of your client. In each of these, I also believe an advertisement of the plaintiff can also be admitted.

Mr. Magid: That is the question I am asking, whether you want us to stipulate to anything else other than the top three sheets.

Mr. Sterry: I don't care. I want it stipulated that the advertisements of the plaintiff——

The Court: Counsel, all we are trying to do is ascertain the facts. We are not trying lawsuits on any technical advantage either party can get. If those advertisements were placed in the newspaper, that is the newspaper, and you have got the date, and the heading of the newspaper. I don't know why you can't stipulate.

Mr. Magid: I think, your Honor, the question is different. There are many pages that Mr. Sterry is presenting. [10]

The Court: All right. Look at all of them.

Mr. Magid: Some of them deal with the plain-

(Testimony of Robert J. Bauer.)

tiff. Some of them deal with the defendant. Some of them deal with neither one of them.

The Court: If they don't deal with either one of you, it doesn't make any difference.

Mr. Magid: The only question I am asking Mr. Sterry is whether he has reference to the three top pages, which we stipulate were and now are advertisements placed by or on behalf of the defendant on the dates set forth in these three top pages.

Mr. Sterry: I intend to offer the advertisements of your client and the advertisements of mine in those two papers, and the rest of the paper I don't think is material.

The Court: Why can't you stipulate?

Mr. Magid: So stipulated.

The Court: All right. They may be received in evidence as Plaintiff's Exhibits 1, 2 and 3. Will you please put them in chronological order?

Mr. Sterry: Yes, if your Honor please. August 5, 1954. I hand the clerk for Exhibit 1, September 3, 1951.

The Clerk: Exhibit 1.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

Mr. Sterry: And the next is July 22, 1954. [11]

The Clerk: Exhibit 2.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Mr. Sterry: I have the next, August 5, 1954, and

(Testimony of Robert J. Bauer.)

I think that should be the West Valley Publishing Company.

The Court: It speaks for itself. It has got a heading on it.

The Clerk: Exhibit 3.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 3.)

Mr. Whalen: Each states there what it is. This is the Reseda Sun, published by the West Valley Publishing Company, except this one is the San Fernando Sun.

Mr. Sterry: When you say "this one," it is Exhibit 1.

Mr. Whalen: Exhibit 1, and Exhibit 2 is the Reseda Sun edition of July 22, 1954, and Exhibit 3 is likewise the Reseda Sun, dated August 5, 1954.

Q. (By Mr. Sterry): Now, Mr. Bauer, I will ask you just to look at those three, and as soon as you have examined them, I want to ask you a question or two about them.

A. (Witness complying.) All right.

Q. Now, Mr. Bauer, I would ask you whether or not in your opinion, from your studying of the advertisements and advertising, those three advertisements of the defendant in this [12] case would or would not cause damage to the plaintiff.

Mr. Magid: That is objected to.

The Court: Sustained. You can't prove damage in that way, Mr. Sterry. You have an advertising man here.

(Testimony of Robert J. Bauer.)

Mr. Sterry: If it is monetary damage, that is not what I intended. I intended to show—perhaps my question is clumsy—that it would be very apt to result in confusion to people even who weren't confused by the advertising.

The Court: You may be able to produce witnesses who can come in here and say they have been confused by this advertising, but you have got here an executive, a man who is head of the Better Business Bureau, and he can't say in his opinion people would be confused.

Mr. Sterry: If your Honor please, let me state what I expect to prove by him, and then if your Honor rules that I can't prove it, why, I shall have to bow to your Honor's ruling.

I want to show by him that he is qualified, first, as an expert, he has been studying advertising, has been studying those things, that even assuming that a person was not confused by the advertising, that it would nevertheless have a tendency to cause confusion to the buying public in that if anybody patronized this store, and it was generally known as Safeway Furniture, and they stated, for instance, that they were dissatisfied with any deal, if they stated they [13] got gypped or were dissatisfied with the deal at Safeway, that that would redound, would be detrimental to the plaintiff. Now that, I believe, is the subject of expert testimony.

The Court: If you are making that as an offer of proof, it is rejected.

Mr. Sterry: Very well. Then I think there is no

(Testimony of Robert J. Bauer.)

need of my asking any further questions. That is what I expect to prove.

The Court: I think that is a question for the court to decide, whether or not there is any confusion, whether or not it would have a tendency to confuse the public.

Mr. Sterry: If your Honor please, many of the authorities point out it is almost impossible to find actual confusion at the consumer level. I don't know how many people, and you don't know, who go there, or anything else.

The Court: Well, it has been done in this courtroom.

Mr. Sterry: But it is not always possible to do it, and I think that we have a right to show that that character of advertisement is apt to be confusing. Now, if your Honor is taking a different view, I shall simply have to bow to it. I told your Honor frankly why I called the witness.

The Court: I am going to have to reject your offer of proof.

Mr. Sterry: I have only one more question then, if [14] your Honor please.

Q. Mr. Bauer, can you state of your own knowledge whether or not in this community the word Safeway denotes the plaintiff?

A. I think Safeway is a household word here, meaning most people would consider it the Safeway Stores that they were talking about.

Mr. Magid: If your Honor please, I move to strike that as not responsive to the question.

(Testimony of Robert J. Bauer.)

The Court: It may go out.

Mr. Sterry: Will you read my question, please?

The Court: Read the question.

(Question read.)

The Court: You can answer that yes or no.

The Witness: Yes.

Mr. Sterry: May I have the question read again?

(Question reread.)

The Court: I think his answer was an opinion. You haven't asked for an opinion.

Mr. Sterry: I thought I had asked him.

Q. What is your opinion?

Mr. Magid: That is objected to, if your Honor please, as incompetent, irrelevant and immaterial, what this man's opinion is as to the question asked.

The Court: Overruled. You may answer. [15]

The Witness: If anyone came to me and said——

The Court: No.

The Witness: All right. If they referred to Safeway——

The Court: Read the question. The question is, do you have an opinion? What is your opinion?

The Witness: My opinion is that when reference is made to Safeway, the average customer in this community would think of Safeway Stores.

Mr. Sterry: That's all.

The Court: Any questions?

(Testimony of Robert J. Bauer.)

Mr. Sterry: If your Honor please, at the suggestion of Mr. Whelan and your Honor, he had only answered that he had an opinion, and it indicates how often you are fooled when you read the record and you find out you haven't proved what you thought you had.

Q. By that you mean the plaintiff in this action?
A. Yes.

Mr. Sterry: That's all.

Cross-Examination

By Mr. Magid:

Q. Mr. Bauer, you have taken a sampling or poll——

The Court: May I suggest that in the federal court we use the lectern, and I would appreciate it if you would use [16] the lectern, according to the rules.

Mr. Magid: I'm sorry.

Q. Mr. Bauer, you have or your organization has taken a sampling or a poll of the so-called average public in connection with this question?

A. We have not, no.

Q. You have not?
A. No.

Q. Have you personally discussed this matter with, say, a hundred of the so-called public?

A. No. But through the years——

Q. Have you——

Mr. Sterry: Wait a minute. Let him answer.

The Court: Just a minute now. We have got a

(Testimony of Robert J. Bauer.)

reporter here and we have three of you going at one time. He can't take three of you. He has a right to answer the question, and if he answers, he has a right to explain his answer, and so don't break in. Now, let's go back and get his answer.

The Witness: Through the years we have had many communications by telephone of one kind or another from business firms and the public where they referred to Safeway, and in each case it would be Safeway Stores, Incorporated, that was referred to. That is on what I base my opinion.

Q. (By Mr. Magid): That goes for complaints, as well as [17] requests for information?

A. For any purpose, yes.

Q. Did you perchance bring with you a record of the complaints that you have received against Safeway Stores? A. I did not.

Mr. Magid: I have no further questions.

The Court: I take it, your opinion is a personal opinion?

The Witness: Certainly, from my business experience.

The Court: A personal opinion.

Mr. Magid: I have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

ROBERT M. SAMPLE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand and state your name, please?

The Witness: Robert M. Sample.

The Clerk: Will you spell your last name?

The Witness: S-a-m-p-l-e. [18]

Direct Examination

By Mr. Sterry:

Q. Mr. Sample, where do you reside?

A. At 13120 Nimrod Place.

Q. Is that in the city of Los Angeles?

A. Yes, sir.

Q. And what is your business or occupation

A. I am vice president of the Better Business Bureau.

Q. That is the same organization that Mr. Bauer is president of? A. It is.

Q. How long have you been associated with that? A. 25 years.

Q. You have heard the testimony as to the character of the work done by that Bureau. Would you have any change to make in that testimony?

A. None whatever.

Q. Have you personally, during the 25 years, followed practically the same lines of endeavor with reference to occupation that Mr. Bauer testified to?

A. That is correct.

(Testimony of Robert M. Sample.)

Mr. Magid: May I interrupt the court and at this time ask that all witnesses other than the one testifying be excluded from the courtroom?

The Court: Denied. [19]

Q. (By Mr. Sterry): Mr. Sample, I will ask you a question, and this is for a yes or no answer. It is not or it is.

Have you an opinion formed not only from your discussions personally with many people, but also in your operation of your Bureau, your business discussions, as to whether or not the word Safeway has come to have a certain definite meaning to the general public?

Mr. Magid: Just a minute, please. We will object to that, if your Honor please, as assuming facts not in evidence.

The Court: Overruled.

The Witness: Yes.

Q. (By Mr. Sterry): What is that opinion?

A. My belief is that Safeway means to the average individual that it is a retail store of one kind or another, particularly the food field.

The Court: I think that can go out. The question is not what it means to the average individual.

The Witness: All right. It means to me, sir.

The Court: Read the question.

(Question read.)

The Court: Now, give your opinion and not what it means to other people.

(Testimony of Robert M. Sample.)

The Witness: Your Honor, may I ask a question?

The Court: No. You can answer that. What is your [20] opinion?

The Witness: The question referred to my experience with other people over the years.

Q. (By Mr. Sterry): The question is from all your conversations in business and your business dealings and everything else, have you an opinion as to whether the word Safeway means anything to the general public?

Mr. Magid: Your Honor please, again we will object on the specific ground that there is no testimony by this witness that he has ever had conversations, and again it is assuming facts not in evidence.

The Court: Supposing I go home tonight and my wife says, "I am going down to the Safeway"? What does she mean?

Mr. Magid: Then you have had a discussion.

The Court: Not necessarily. This man has an opinion. I will allow him to give his own opinion. I won't allow him to give the opinion of anybody else.

Mr. Magid: But the question is asked, if the reporter will be good enough to read it, I think the court will see that part of the question to which I am objecting.

The Court: You can give your opinion. Objection overruled. Give your opinion.

(Testimony of Robert M. Sample.)

The Witness: My opinion is that Safeway means retail store, particularly in the food field.

Q. (By Mr. Sterry): Anyone, or the stores operated by [21] the plaintiff? A. That's right.

Q. Counsel objected to the fact that you had not testified to having a conversation with anybody except in business. Eliminating anything that you have heard in your business conversations, have you ever heard, not once, but many times, the word Safeway used by other people not in business, when you go home or with your friends?

A. I have.

Mr. Sterry: No further questions.

The Court: Cross-examine.

Mr. Sterry: If your Honor please, I am very sorry, but I forgot to take the stand. It was inadvertence.

The Court: We have a different procedure than in the Superior Court. We find that if counsel will use the lectern, they will speak louder.

Mr. Sterry: Your Honor, I have no criticism of that. I am merely apologizing for overlooking your Honor's request. It was not through any intention of doing it.

The Court: All right.

(Testimony of Robert M. Sample.)

Cross-Examination

By Mr. Magid:

Q. Mr. Sample, I have placed before you Plaintiff's Exhibit No. 3, and ask you whether in your opinion that advertisement [22] refers to the Safeway Stores, which I believe you characterized as a retail grocery store.

Mr. Sterry: If your Honor please, I am perfectly willing to throw the examination wide open to both parties as to what the opinion of this witness is as to the effect of that, but when I asked him what its effect was and told your Honor the effect, you sustained the objection and held it was a matter for the court. On that same ground, I am going to object unless the defendant will stipulate there will be no objection to my propounding the questions I propounded to Mr. Bauer.

The Court: I think the advertisement speaks for itself.

Q. (By Mr. Magid): Mr. Sample, have you had discussions with the so-called average public or common man with respect to their belief in the name Safeway as it applies to the plaintiff and to the plaintiff only? In other words, have you taken, either personally or your Bureau, a sampling or a public opinion poll on this question?

A. I have not.

Mr. Magid: I have no further questions, your Honor.

Mr. Sterry: That's all.

The Court: You may step down. May this witness be excused?

Mr. Magid: He may, your Honor. [23]

The Court: You may be excused.

(Witness excused.)

FRANK DENNEY

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Frank Denney.

The Clerk: How do you spell your last name?

The Witness: D-e-n-n-e-y.

Direct Examination

By Mr. Sterry:

Q. Mr. Denney, where do you reside?

A. I live at 10 De Sablo Road, San Mateo, California.

Q. Will you tell the court if you are connected with the plaintiff, Safeway Stores, Incorporated?

A. Yes, I am.

Q. In what way or manner?

A. I am manager of Madison Buyers, which is a division of Salem Commodities, Inc., which in turn is a wholly-owned subsidiary of Safeway Stores, Incorporated.

Q. What is the function of the Commodities Company?

(Testimony of Frank Denney.)

A. The function of Salem Commodities is both manufacturing [24] and purchasing.

Q. Goods for sale by—

A. By Safeway Stores.

Q. You say Madison Buyers is a division of that. What is the function of Madison Buyers, or, rather, I will put it this way, what is your function as manager of Madison Buyers?

A. I oversee all of the purchasing of non-food commodities that are handled by Safeway Stores.

The Court: May I ask a question? You say non-food commodities?

The Witness: Yes, sir.

The Court: Does the Safeway Stores handle furniture?

The Witness: Yes, Safeway Stores does.

The Court: What kind of furniture?

The Witness: We handle such things as lawn chairs, hassocks, TV tables—just a whole host of products that would fall under the furniture classification.

The Court: You don't handle all kinds of furniture? You don't handle bedroom sets, dining room tables?

The Witness: We handle certain types of tables, your Honor, patio tables, for example.

The Court: You handle outdoor furniture?

The Witness: Yes, we do.

The Court: Do you handle indoor furniture?

The Witness: A hassock would be considered an

(Testimony of Frank Denney.)

indoor [25] piece of furniture. We have handled probably 50 carloads of hassocks.

The Court: What is a hassock? What do you mean by the term hassock?

The Witness: A hassock is a—it might be termed a footstool. It is used in any number of ways in a living room. People sit on them in front of a TV set, or put their feet on them.

The Court: You have TV tables and hassocks. What else do you have?

The Witness: Mr. Sterry, could I have that list?

Mr. Sterry: Oh, certainly.

The Witness: I could be more specific with that, then.

Mr. Sterry: I will give counsel for defendant a copy of the list.

The Court: I understand you are a buying organization?

The Witness: Yes, your Honor.

The Court: Buying for Safeway Stores?

The Witness: Yes, sir.

The Court: You buy for the local Safeway Stores?

The Witness: We buy for the local division just as we buy for 20 other Safeway divisions.

The Court: This furniture you are talking about is [26] sold in the local Safeway stores?

The Witness: We have some furniture that has been sold in the local Safeway stores.

The Court: I am interested in what is happen-

(Testimony of Frank Denney.)

ing in Los Angeles. I am not interested in New England and Canada. What have you done in Los Angeles?

Mr. Sterry: If your Honor please, may I make a statement so that you can understand the situation?

The Court: Yes.

Mr. Sterry: I am not stating evidence but I am stating what I am certain we can prove. The Safeway organization is by divisions, and the division manager is to a very large extent the arbiter of what they have and what they sell. Now, there are certain items of furniture, such as brooms and mops and some tables, that are sold in all divisions. There are other items that have not been sold in some divisions and some that are.

The Court: Do you consider a mop or broom furniture? That is an accessory, isn't it? Drug stores sell mops and brooms. They are not furniture stores.

Mr. Sterry: That is quite true, but I want your Honor to get the situation. The articles of furniture that Madison Buyers have been buying have not been up to date handled by the Los Angeles division, except in a very limited quantity. We can prove, if your Honor permits us, that the [27] division manager has been changed, and the present manager plans to sell all of these items, but up to date there has been such a negligible amount of them that if any right depended on what we

(Testimony of Frank Denney.)

have done to date, I would not make any claim, if I make myself clear on that.

Mr. Magid: We, of course, will object to any such offer of proof, as to what they plan to do.

The Court: It is not an offer of proof.

Mr. Magid: That is the only way I could interpret his statement, if it is at all pertinent.

Mr. Sterry: The court seemed a little confused.

The Court: I was going to say, Mr. Sterry, out where I live Safeway has put in an unusually large store, in fact, one of the largest I know of, but I haven't seen any furniture. But I am going back there tonight and see if I see any.

Mr. Sterry: You will not see any furniture.

The Court: I won't?

Mr. Sterry: So that we can get it before your Honor, I will make this offer. I offer to prove by this witness, and I can't prove everything by one witness, that since 1954 Safeway in various divisions has been selling a large quantity of items of furniture. I have handed counsel a list of them. Your Honor can look at that list without admitting it in evidence and see what its character is. It has been sold [28] in nearly all divisions except Los Angeles. Los Angeles has up to date not handled that. The new manager of the division has planned when he came here to offer that for sale. I think we have a right to do that.

We sell household articles, and many of the cases in the brief, if your Honor will look at them, refer to the very fact that to allow somebody who is not

(Testimony of Frank Denney.)

at the present moment competing with us to use our name would be to unduly restrain us in our power of enlargement of trade. There are quite a number of cases to that effect in there. In fact, there is one in the Ninth Circuit——

The Court: You go ahead, Mr. Sterry, and make your proof. Whether or not it is material or whether or not it will have anything to do with this case, I don't know.

Mr. Magid: If your Honor please, the defendant will be most happy to have Mr. Sterry present this for an exhibit. We will have no objection to it going into evidence.

Mr. Sterry: All right. Would your Honor care to have a copy of it before you?

The Court: If you are going to put it in evidence, I will have the original. It may be admitted in evidence as Plaintiff's Exhibit 4.

The Clerk: Exhibit 4.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 4.) [29]

The Court: This list has been marked Exhibit 4. I assume the names over here are the names of cities in which Safeway Stores are located?

The Witness: Those are the names of the divisions, your Honor. By coincidence, they are cities, too, but they are the names of divisions to which we sold.

The Court: This shows the furniture you have

(Testimony of Frank Denney.)

sold through the various Safeway stores, and the furniture that the various Safeway stores have sold to the general public, is that right?

The Witness: That's right.

The Court: In Los Angeles we have got step stools?

The Witness: That happened to be the first one. We went back in our records to 1952, January. The first that was available from what we could see with a reasonable search was this, and then we proceeded from that point until March of 1956.

The Court: Let's see if we can find any other Los Angeles items.

Mr. Sterry: Your Honor, I will hand this to the witness.

The Court: Yes.

Mr. Sterry: I think there are none.

The Court: The only thing that has been sold in the Los Angeles division has been step stools, is that correct? [30]

The Witness: That is according to the records of Madison Buyers. I am not responsible for maintaining the records of the Los Angeles division. I am not aware of what the Los Angeles division itself may have purchased, not through our organization.

The Court: We can put it this way: This is the only item you know about?

The Witness: That is correct.

Mr. Sterry: Your Honor, as I have indicated before, I do not claim that there was any great

(Testimony of Frank Denney.)

amount of furniture of this kind sold by the Los Angeles division up to date. You have here in Exhibit 4, on the next to the second column from the right-hand side under quantity, you have a dollar sign, and that was inadvertent.

The Witness: Yes. That was a typographical error. That means 75 step stools or 210 TV trays. It does not mean dollars.

Mr. Magid: The defendant will stipulate that may be stricken, your Honor.

Mr. Sterry: If your Honor please, let's stipulate that his Honor can mark, instead of the dollar sign, the sign for number.

The Court: I will change the dollar sign to "No."

Q. (By Mr. Sterry): On your last column, "Our Cost," is that the cost of Madison [31] Buyers?

A. That is the cost to Madison Buyers.

Q. You have no records and you don't attempt to keep a record or find out what those items are sold for at retail?

A. No, sir.

Q. There is one more item which I think is admissible. Aside from furniture, have you also in other divisions, not in Los Angeles, sold any large considerable quantities of tablewares, such as dishes and spoons and glasses?

A. Yes, we have, Mr. Sterry. We have tableware, such things as chinaware, plastic dishes, flat ware of various types, spoons. We probably, during this period of time, I haven't attempted to have

(Testimony of Frank Denney.)

our accounting department tabulate it, but an educated guess is we have sold somewhere in the neighborhood of a million dollars worth of that type product.

The Court: But none in the Los Angeles area?

The Witness: Yes, we have, your Honor. We have sold flat ware in the Los Angeles area. It is not listed here. It was about 1953. Again, I would have to examine our records to precisely determine the quantity and the dates.

Mr. Sterry: That's all.

Cross-Examination

By Mr. Magid:

Q. Mr. Denney, your organization, like others of its kind, shops your competition, do you not? [32]

A. Do what?

Q. Shop your competition? You go into other stores——

The Court: What difference does that make?

Mr. Magid: I think it is just as important as the fact that somewhere outside of Los Angeles they sell spoons and tableware.

The Court: I am not satisfied that what they do in Dallas or Omaha or Little Rock has anything to do with the question before the court. I am not satisfied at the present time.

Mr. Magid: Then, if I may, your Honor——

Q. Confining ourselves to Los Angeles, your Exhibit 4 shows that you sell step stools in Los Angeles

(Testimony of Frank Denney.)

and have done so since January 5, 1952. Have you ever gone into Safeway Furniture Store and seen a step stool there?

A. I have never been in Safeway Furniture Store.

Q. Have any of your subordinates, to your knowledge, gone into the defendant's store for the purpose of checking to see what they sold?

A. Not to my knowledge.

Q. Have you examined any of their advertisements in the newspapers? A. I personally?

Q. Yes. A. No, I haven't. [33]

Q. Have you caused any of your subordinates to do that?

A. No. That is not a normal responsibility of my organization to examine that.

The Court: The question is, did you do that?

The Witness: No, sir, I have not.

Mr. Magid: I have no further questions, your Honor.

Mr. Sterry: If your Honor please, I overlooked one question. May I ask it?

The Court: Yes.

Mr. Sterry: It is not my policy to have redirect, but I want to offer this as part of my direct.

I think I would agree entirely with your Honor that what they do in Dallas or other places would not be material here if we were not able to show that it is not a mere possibility, but that we are intending to and going to immediately do the same

(Testimony of Frank Denney.)

thing here, and this question is asked on that theory.

Redirect Examination

By Mr. Sterry:

Q. This calls for yes or no, not what it is. Have you in buying this non-food line that you have shown had to keep track of what your competitors are doing, large and small, individual markets, small and large chains of stores?

A. Yes, I have. [34]

Q. What has been the tendency, if any, of your competitors to sell merchandise of that character?

Mr. Magid: I object to that, if the court please, not being within the issues of this case, irrelevant, immaterial.

The Court: Mr. Sterry, I know the tendency of most of the supermarkets is to go in all lines of business. In fact, there are even some who are selling clothing.

Mr. Sterry: Yes.

The Court: But I don't think it has a thing to do with this case. The question here is whether or not the plaintiff has a right to preclude the defendant from using the word Safeway.

Mr. Sterry: That is true, but, if your Honor please, my only thought—I don't want to argue with the court after he has made a ruling, and I don't understand your Honor has—my only object is I expect to put on Mr. Christenson, the new

(Testimony of Frank Denney.)

manager of the division who, I think, will convince your Honor we intend to do just this.

The Court: I may allow him to testify.

Mr. Sterry: And we have to do it to meet competition.

The Court: I may allow him to testify what he wants to do, but that is not the question. The question is, what do your competitors do? [35]

Mr. Sterry: I think that is only cumulative of the evidence to show that that is what we have to do.

The Court: I will sustain the objection upon the ground that it is not material as far as this witness is concerned.

Mr. Sterry: Very well, if the court please. That's all, Mr. Denney.

The Court: You may step down.

(Witness excused.)

Mr. Sterry: Mr. Denney came down from San Francisco. May we excuse him to leave?

Mr. Magid: Certainly.

The Court: You may be excused.

Mr. Sterry: Mr. Heller.

MILTON F. HELLER

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Milton F. Heller.

The Clerk: Please spell your last name.

The Witness: H-e-l-l-e-r. [36]

Direct Examination

By Mr. Sterry:

Q. Mr. Heller, where do you live?

A. 895 San Marino Avenue, San Marino.

Q. Are you now connected with the plaintiff, Safeway Stores, Incorporated?

A. I am retired, but I am still an employee of the company.

Q. You are still just as much interested in their success as though you were with them?

A. Yes, sir.

Q. Before your retirement, what was your position? A. Division manager, Los Angeles.

Q. Now, the division of Los Angeles, what district is comprised in the Los Angeles division?

A. Everything, including San Luis Obispo, Kern, Inyo, south to the Mexican border, and including two stores in Las Vegas, Nevada.

Q. When did you first go with Safeway?

A. January 1, 1932.

Q. Where? A. San Diego.

(Testimony of Milton F. Heller.)

Q. When did you take over the management of the Los Angeles division?

A. January 1, 1949. [37]

Q. Since then you held that position continuously until your retirement? A. Yes, sir.

Q. And when was your retirement?

A. Well, Mr. Christenson took over May 7th. That is when the change occurred.

Q. I forgot to ask you, Mr. Heller, your age.

A. 62.

Q. And, Mr. Heller, you have been, during the time that you have been manager, in control, subject to the directions of the head office, of the entire division? A. Yes, sir.

Q. Now, I think everything you can testify to has been admitted either by failure to deny allegations or by answers to our interrogatories, but defendant has asked us to stipulate and will undoubtedly offer a stipulation that there are some 85 registrations of fictitious names using the word Safeway. I want to ask you if during your entire time as manager of this division you were conscious of any other concern that ever used the word Safeway as a word to advertise or prominently used it in the manner in which it has been in Exhibits 1, 2 and 3?

A. Not insofar as advertising or the use of the name publicly or on buildings is concerned, other than the case we had in San Diego. [38]

Q. May I refresh your recollection that there

(Testimony of Milton F. Heller.)

were two cases where it was attempted that you directed our office to bring action to stop it?

Mr. Magid: That, if your Honor please, is objected to as being irrelevant, immaterial, incompetent, what communications passed between the witness and counsel's office.

The Court: He said that for the purpose of refreshing his recollection. Overruled. Does that refresh your recollection?

The Witness: I did not realize, your Honor, that that was included in the question originally. There have been cases where the name Safeway was used. One I have particularly in mind is the Safeway Realty Company, which was a name on West Adams. When it was brought to their attention that there was confusion in the minds of some people, that that was possibly a Safeway Stores' operation, they desisted from using the name.

Q. (By Mr. Sterry): Mr. Heller, whenever your attention has ever been called to the use of the word Safeway by itself or even prominently by any other concern, what action, if any, have you taken?

A. We advised our legal department at Oakland.

Q. Were you—this is a yes or no question—were you ever, during the time you were manager, conscious of any widespread use of the name Safeway at all? [39] A. No.

Mr. Sterry: Take the witness.

(Testimony of Milton F. Heller.)

The Court: Before you take the witness, may I ask a question of the witness?

Mr. Sterry: Certainly, your Honor.

The Court: You say you came with Safeway in 1922?

The Witness: 1932.

The Court: 1932. You don't know anything about Safeway prior to 1932?

The Witness: Other than they were a competitor of ours at that time in San Diego.

The Court: Before 1932, where were you?

The Witness: I had been in the grocery business almost 44 years.

The Court: Where?

The Witness: Part of the time here and prior to that in San Diego.

The Court: But your first connection with the word Safeway was in 1932?

The Witness: As an employee of the company, I was aware of it prior to that, because I was with MacMarr Stores prior to Safeway, and prior to that with Heller's, Incorporated.

The Court: You knew there was Safeway Stores?

The Witness: Yes.

The Court: But you had no personal knowledge of the [40] store or its operations until 1932?

The Witness: Other than as a competitor.

The Court: Other than as a competitor. All right.

(Testimony of Milton F. Heller.)

Cross-Examination

By Mr. Magid:

Q. Mr. Heller, as division manager of the Los Angeles district, you visited your different stores at different times? A. Yes, sir.

Q. Have you ever been to the Safeway Furniture Store in Van Nuys?

A. Not in that store. I have observed it from the outside.

Q. You have observed it from the outside?

A. Yes, sir.

Q. Where is the nearest Safeway Store belonging to the plaintiff with relation to the defendant's place of business?

A. There was one on Friar Street, I believe, just off of Van Nuys Boulevard. That store has since been closed. I could not, without examining a map, tell accurately the closest one. Perhaps the one at Van Nuys and Castor. I am not sure.

Q. It can't be at Van Nuys and Castor. They both run the same way.

A. Not Van Nuys. I beg your pardon. [41] Ventura.

Q. Ventura and Castor? A. Yes.

Q. That would be four, about four and a half miles from Victory and Van Nuys Boulevard?

A. No, sir, it would not. I would judge it wouldn't be over a mile and a half, two miles.

Q. Isn't it true it is exactly three miles from Victory Boulevard to Ventura Boulevard?

(Testimony of Milton F. Heller.)

A. You couldn't prove it by me.

Mr. Whelan: Your Honor, I believe counsel is arguing with the witness.

Q. (By Mr. Magid): Are you familiar with the San Fernando Valley where Safeway Furniture Store is located? A. Yes, sir.

Q. Do you know there is exactly a measured half mile between each boulevard? A. No.

Q. Have you observed that in your——

A. I have had no occasion to, as a matter of fact.

Q. Can you tell how many boulevards there are between Victory Boulevard and Ventura Boulevard? A. No.

Q. Do these names refresh your recollection, going south from Victory Boulevard to Ventura Boulevard, Oxnard? A. Yes. [42]

Q. Burbank? A. Yes, sir.

Q. Chandler? A. Yes, sir.

Q. Magnolia?

A. I don't know whether Magnolia crosses Van Nuys or not.

Q. Riverside Drive?

A. I think it dead ends.

Q. That's right, but Riverside Drive dead ends at Van Nuys Boulevard at the left going south, is that correct?

A. Well, the streets change very often, as you know. I wouldn't say that it is or is not. You seem to know whether it is correct or not.

(Testimony of Milton F. Heller.)

Q. After Riverside Drive we have Moor Park, is that correct, where the Cadillac people are?

A. The only Cadillac I know is on Ventura Boulevard, and that doesn't extend to Van Nuys. That is your question. You seem to be familiar with the streets and where they dead end.

Q. Then you have Ventura Boulevard?

A. Yes, sir.

Q. Do you know how far it is from Van Nuys Boulevard west to Castor?

A. About a quarter of a mile, I should [43] judge.

Q. If I should tell you it is exactly one-half mile, would that refresh your recollection?

A. I don't know anything about your measurements.

The Court: Just a minute. May I suggest that if this witness can't, then that you have testimony as to the distance? Why argue with the witness when you can establish it yourself? You know we are working against time on this case.

Mr. Magid: That is why I told your Honor I doubted if we could get through in a day and a half.

The Court: If you keep the case to the issues, I don't know how it will take a day and a half.

Mr. Sterry: If your Honor please, I don't believe it is material how close his store is there, but I haven't objected.

The Court: This witness doesn't know. Why proceed along that line?

(Testimony of Milton F. Heller.)

Q. (By Mr. Magid): At any rate, there is no Safeway store now in Van Nuys, is that correct?

A. Sherman Oaks—I beg your pardon. The one at Castor and Ventura, I would consider in Van Nuys, and we have a site now at Sherman and Van Nuys we expect to build on.

Q. You do not know, then, that your post office address would be Sherman Oaks and not Van Nuys?

A. I don't know anything about post office address. We have only one post office address, and that is at the Terminal Annex. [44]

Q. Did you ever notice the huge sign of Safeway Loans on Sunset Boulevard near Cahuenga?

A. No, sir.

Q. Did you ever notice the sign of Safeway Finance Company on Sunset Boulevard?

A. No, sir.

Q. Did you ever see the sign of Safeway Auto Parks in Los Angeles? A. No, sir.

Q. Did you ever see the sign of Safeway Lock Company in Los Angeles? A. No, sir.

Q. Have you gone to any of your Safeway Stores in Burbank? A. Yes, sir.

Q. Have you ever noticed a sign of Safeway Service of Burbank? A. No, sir.

The Court: You have never noticed any store that used the word Safeway, have you, except the Safeway stores?

The Witness: That is the only one I am conscious of.

(Testimony of Milton F. Heller.)

The Court: That's the only one you are conscious of.

Mr. Magid: I have no further questions. [45]

Mr. Sterry: That's all.

The Court: May this witness be excused?

Mr. Magid: By the defendant he may be.

Mr. Sterry: Certainly.

The Court: You may be excused.

Mr. Sterry: Mr. Ludke.

HENRY J. LUDKE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Henry J. Ludke.

The Clerk: Spell your last name.

The Witness: L-u-d-k-e.

Direct Examination

By Mr. Sterry:

Q. Mr. Ludke, where do you reside?

A. 4006 Westside Avenue, Los Angeles.

Q. You are employed by the plaintiff in this case?

A. Yes.

Q. Please keep your voice up. In what capacity?

A. Advertising manager for Southern California.

Q. The Los Angeles division?

A. Los Angeles zone. [46]

(Testimony of Henry J. Ludke.)

Q. Mr. Ludke, most of the advertisements have been admitted and stipulated to, and his Honor has stated, and I think quite correctly, an advertisement speaks for itself, so I will ask you just generally, have you advertised throughout the San Fernando Valley and Van Nuys and the vicinity in all the local papers out there? When I say you, I mean the plaintiff.

A. Yes, we have.

Q. For how long a period of time has the plaintiff advertised only under the name of Safeway, without using the other words in its name?

A. I would say 15 years or more.

Q. At least 15 years? A. 15 years.

The Court: Let's get that down to some year. What year would you say you started to use the word Safeway only?

The Witness: We can say, I think it is 20 years.

The Court: Well——

The Witness: Say 15 years.

The Court: Can you give me the year?

The Witness: I don't know the exact year, but we looked it up, and it is over 15 years, we will say.

The Court: Around 1940 some time?

The Witness: Before that. 1936.

The Court: 1936. How long have you been with the [47] company?

The Witness: I have been with the company since February 5, 1929.

The Court: Before 1929 where did you work?

The Witness: I was with the Piggly-Wiggly Company.

(Testimony of Henry J. Ludke.)

The Court: Did you come to the Safeway Company when it was organized?

The Witness: I came to Safeway when Safeway purchased the Piggly-Wiggly Company in 1929.

The Court: When did you start to use the word Safeway?

The Witness: Back 20 years.

The Court: They didn't use the word Safeway before 1929, did they?

The Witness: They used Safeway, the Safeway Company, as I understand the——

The Court: I don't want your understanding. This is of your own knowledge. Do you know? I am asking your own knowledge. When did they use Safeway first of your own knowledge?

The Witness: In 1926 is when Safeway Stores, the name, was first used.

The Court: Some time in 1926?

The Witness: I think the anniversary is March, 1926.

The Court: March, 1926. Are you relatively sure [48] that the word Safeway was used for the first time by your company in March, 1926?

The Witness: Yes. I am very sure. That is when the company was organized.

The Court: Have we got anything to establish this date, Mr. Sterry?

Mr. Sterry: It is stipulated, your Honor, they have always used Safeway, but they have advertised, according to the stipulation, in affidavits which have been admitted, since 1941.

(Testimony of Henry J. Ludke.)

The Court: Mr. Sterry, here is the question that has bothered me ever since I read your stipulation. According to the stipulation, there were certain organizations and businesses that used Safeway in 1926.

Mr. Sterry: Yes. They were all associated with the plaintiff corporation.

The Court: No. Here is Safeway Cab Company in 1926, and here is Safeway Auto Finance Company in 1926, and here is Safeway Lock Company in 1926. Now, if the word Safeway had been used or was in common use, could anybody come in after that time and establish a right by which they could appropriate the name?

Mr. Sterry: If your Honor please, if you will read some of the decisions by the Ninth Circuit Court of Appeals——

The Court: Mr. Sterry, according to the rules of [49] court, a trial memorandum is supposed to be filed with the court five days before trial. I just looked at the file and neither the plaintiff nor the defendant has filed any trial memorandum, and, consequently, I have got to rely on the information I have.

Mr. Sterry: That is my mistake. I filed and handed to your Honor a trial brief.

The Court: But I haven't had a chance to look at it.

Mr. Sterry: I don't think there was any general use of it.

The Court: I don't care whether it was ever

(Testimony of Henry J. Ludke.)

used or not, but here was a use of the word Safeway and according to your complaint, you allege you originated the word Safeway.

Mr. Sterry: Yes, and the Ninth Circuit Court of Appeals has so held.

The Court: That you originated it?

Mr. Sterry: They held it was a coined word.

The Court: You say in 1926 you coined the distinctive trade name Safeway. Did you adopt it from the use of somebody else?

Mr. Sterry: No, I don't think so.

The Court: I would like to know when in 1926 you adopted and first started to use the word Safeway? Can you establish that in any way?

Mr. Sterry: Only by the records and the stipulation. [50] We started in 1926. I think that was when the company first organized.

The Court: This witness says he thinks it was March, 1926.

Mr. Sterry: Well, I can't tell you more than that, if your Honor please. That is 30 years ago.

The Court: This may be important.

Mr. Sterry: Mr. Whelan calls my attention to this affidavit, which is admitted to be true. I haven't read it for some time.

The Court: Is that in the file?

Mr. Sterry: Yes. That has been filed, if your Honor please.

Mr. Whelan: It is Exhibit Q to the request for admissions which was filed in this case.

Mr. Sterry: Paragraph 8, page 4, "that as to

(Testimony of Henry J. Ludke.)

the use of the trade name 'Safeway' in California"——

The Court: What line is that?

Mr. Sterry: Page 4.

The Court: Line what?

Mr. Sterry: Line 5.

The Court: All right.

Mr. Sterry: Should I read it or does your Honor want to read it?

The Court: Go ahead, if you want to. [51]

Mr. Sterry: "That from 1925 until in the early part of 1941, Safeway of California operated in California retail grocery stores primarily under the name of 'Safeway,' although in some cases the names 'Safeway Stores,' 'Safeway Stores, Incorporated,' or 'Safeway Stores, Inc.,' were also used; that some stores when first acquired by Safeway of California were operated under names other than 'Safeway'—for example, in about 1929, Safeway of California acquired the assets and business of a chain of retail stores in California operating under the name of 'Piggly-Wiggly,' pursuant to franchise from the Piggly-Wiggly Corporation; Safeway of California made other acquisitions, such as the acquisition of the assets and business of MacMarr Stores, Inc., and its subsidiaries in 1931; as the result of these acquisitions, the trade names 'Piggly-Wiggly' and 'MacMarr' were continued in use on the stores so acquired for some time, but

(Testimony of Henry J. Ludke.)

gradually the use of all trade names other than 'Safeway' was discontinued;

"That from the early part of 1941 until its dissolution as of the close of business on December 31, 1942, Safeway of California operated in California retail grocery stores under the trade name 'Safeway' alone."

The Court: You don't have to go any further than that. Of course, this is an affidavit.

Mr. Sterry: But it was admitted.

The Court: All right. But when did they first use [52] the name Safeway? They say about 1925. I want something definite, not just approximately.

Mr. Magid: If your Honor please, the request for admissions, page 8, request No. 34, the first sentence which was admitted, says since 1926. That was admitted. Not the affidavit, which says 1925.

The Court: I am going to have some definite testimony here as to when the word Safeway was actually used. I don't know what the law is, but it seems to me if a word is used, somebody else cannot come in and appropriate it and then by extensive advertising build it up and preclude everybody from using it.

Mr. Sterry: Your Honor, Mr. Whelan tells me that the statement of counsel refers to requests 33 and 34, and not to the request which I read from Mr. Wilde's affidavit.

The Court: Is Mr. Wilde going to be here?

Mr. Sterry: I can have him here, but you will have to continue it. When he makes an affidavit of

(Testimony of Henry J. Ludke.)

all he can testify to and it is admitted, I hadn't supposed it was necessary to have him here. I had supposed under the practice——

The Court: All right. But I can't take his testimony or I won't take his testimony as final that about so and so something happened. I am going to have something more definite than that. The problem here is the plaintiff says they originated the word Safeway. [53]

Mr. Sterry: Yes.

The Court: A doubt is in my mind whether they did originate the word Safeway. I think you picked up a word that was in use. I don't think there is any question they have built up the word until Safeway means Safeway Food Store. I am willing to go along on that.

Mr. Sterry: If it obtained that secondary meaning, then under all the authorities, we have a right to protect it. If someone has used it, and we have taken and built it up, we have got a right to protect the secondary meaning.

The Court: But we have got a stipulation that there is at the present time any number of people in this community using the word Safeway. Are you going to bring an action against each of them and make them quit using the word Safeway?

Mr. Sterry: I feel very remiss in not having filed this trial brief of mine sooner than I did. I was unaware of your rule or I would have done it. But if your Honor will take occasion to read it or permit me to read to you the cases, they are unani-

(Testimony of Henry J. Ludke.)

mous from the Ninth Circuit down that the fact that other persons use the name is no defense.

The Court: Mr. Sterry, we tried a case in this department not very long ago, the Fairway case. That involved the Fairway Food Market. That case went to the Ninth Circuit. I am thoroughly familiar with the law relative to the appropriation of names and the use of names and the question [54] of confusion. I am thoroughly familiar with that. But here is one problem I am not familiar with. If you use a name that is in public use, can you build it up to such an extent that you can preclude everybody else from using that name in any line of endeavor?

Mr. Sterry: If you have attained a secondary meaning. Suppose somebody in 1900 had used the word and abandoned it, but then you come along and use it and build up a secondary meaning. If your Honor please, I realize I am at fault, but our brief will show at least five or six decisions by this court and by the Ninth Circuit holding that that has a secondary meaning.

The Court: Mr. Sterry, I am willing to go along with you as far as food markets are concerned, that Safeway has established a secondary meaning in this community. Safeway means food markets. But you are going beyond the food markets. You are going into the furniture field. Now, whether or not your secondary meaning can be extended into the furniture field is something I do not know.

(Testimony of Henry J. Ludke.)

I noticed the other day, Mr. Sterry, after I received this case and was looking at it, there was a truck going up and down Spring Street, and on the side of it it said Prudential Cleaners. If any name has got a secondary meaning, it is Prudential Insurance Company. Does Prudential Insurance Company preclude anybody in an alien field from using that? [55]

Mr. Sterry: You have asked me several questions which are severally treated in this brief. I trust your Honor will allow me to present the law. If I am negligent in not filing this brief with you five days earlier, I trust you will not hold that against my client.

The Court: I will give you every opportunity to present the law. I am interested in the facts at the present time. One of the facts I am interested in is when the plaintiff first started to use the word Safeway.

Mr. Sterry: If your Honor please, that is set out in Mr. Wilde's affidavit, and I think probably it is as definite as it can be at this time.

The Court: May I ask a question? When was Safeway first incorporated? Maybe we can get it that way.

Mr. Sterry: I couldn't tell you that. I will have to telegraph or have somebody from Safeway here. Unfortunately, I can't do it tomorrow. I can look through these affidavits again. The affidavit of Mr. Wilde, and your Honor said you couldn't receive the affidavit, and that, of course, is correct. It was only

(Testimony of Henry J. Ludke.)

an affidavit. But I filed that affidavit and we asked for admissions, and they admitted it was correct. If they hadn't admitted it and we brought Mr. Wilde down here and proved it, your Honor would have had the right to assess costs upon him. Mr. Wilde's affidavit states it was filed in 1925. [56]

The Court: Let's read what Mr. Wilde says.

Mr. Sterry: All right.

The Court: "That from 1926"—he doesn't say the first part of 1926—"from 1926, and, thereafter, until the close of business on December 31, 1942, Safeway Stores, Incorporated, a Maryland corporation, owned the stock of, controlled and managed Safeway Stores, Inc., a California corporation * * *"

It doesn't say anything about when the California corporation was organized.

Mr. Sterry: Yes; if your Honor please, if you will turn to page 5. Let me read it.

The Court: All right. What page?

Mr. Sterry: I will start from the very beginning of Exhibit Q, starting on page 1:

"That he is now and since February 22, 1931, has been associated with and/or employed by Safeway Stores, Incorporated, a Maryland corporation (hereafter sometimes called Safeway of Maryland), and/or its former subsidiary, Safeway Stores, Inc., a California corporation (hereafter sometimes called Safeway of California);

"That as secretary of Safeway of Maryland, one

(Testimony of Henry J. Ludke.)

of his duties is to maintain the corporate records of said Safeway of Maryland;

“3. That in his capacity as secretary of [57] Safeway of Maryland he has access to and has examined the pertinent original corporate records of all former subsidiaries of said Safeway of Maryland, hereinafter referred to.

“4. That all facts hereinafter set forth for the period since February 22, 1931, are within his personal knowledge true and correct, and all facts hereinafter set forth for the period prior to February 22, 1931, are based upon his examination of the pertinent original corporate records and as to all such facts he is informed and believes that such facts are true and correct.

“That as to Safeway Stores, Inc., a California corporation, he says:

“That on August 14, 1914, Sam Seelig Company, a California corporation, was organized and authorized to engage in a general retail grocery business in California;

“That in 1925, by amendment of its articles of incorporation, the name of Sam Seelig Company, a California corporation, was changed to Safeway Stores, Incorporated, a California corporation;

“That in 1934, by amendment of its articles of incorporation, the name of Safeway Stores, Incorporated, a California corporation, was changed to Safeway Stores, Inc., a California corporation;

“That as of the close of business on December 31, 1942, Safeway Stores, Inc., a California corpora-

(Testimony of Henry J. Ludke.)

tion, transferred [58] all of its assets, good will, etc., to Safeway Stores, Incorporated, a Maryland corporation, in complete liquidation.

“That as to Safeway Stores, Inc., of Nevada, a Nevada corporation (hereinafter sometimes called Safeway of Nevada), he says:

“A. That on August 4, 1926, Skaggs-Safeway Stores, Incorporated, a Nevada corporation, was organized, and in 1934 was qualified to engage in and commenced to operate a general retail grocery business in California;

“B. That in 1928, by amendment of its articles of incorporation, the name of Skaggs-Safeway Stores, Incorporated, a Nevada corporation, was changed to Safeway Stores, Incorporated, a Nevada corporation;

“C. That in 1941, by amendment of its articles of incorporation, the name of Safeway Stores, Incorporated, a Nevada corporation, was changed to Safeway Stores, Inc., of Nevada, a Nevada corporation;

“D. That as of the close of business on December 31, 1942, Safeway Stores, Inc., of Nevada, a Nevada corporation, transferred all of its assets, good will, etc., to Safeway Stores, Incorporated, a Maryland corporation, in complete liquidation.

“7. That as to Safeway Stores, Incorporated, a Maryland corporation, he says:

“A. That on March 24, 1926, Safeway Stores, Incorporated, [59] a Maryland corporation, was organized;

(Testimony of Henry J. Ludke.)

“B. That from 1926, and, thereafter, until the close of business on December 31, 1942, Safeway Stores, Incorporated, a Maryland corporation, owned the stock of, controlled and managed Safeway Stores, Inc., a California corporation, and Safeway Stores, Inc., of Nevada, a Nevada corporation, and during all of said period said Safeway Stores, Inc., a California corporation, and Safeway Stores, Inc., of Nevada, a Nevada corporation, were operating subsidiaries of said Safeway Stores, Incorporated, a Maryland corporation;

“C. That as of the close of business on December 31, 1942, Safeway Stores, Incorporated, a Maryland corporation, acquired all of the assets, good will, etc., of Safeway Stores, Inc., a California corporation, and Safeway Stores, Inc., of Nevada, a Nevada corporation, in complete liquidation of said subsidiaries.”

So that, your Honor, in effect it says they have been operating in California, first as an independent and then as subsidiaries of the present business, since 1925.

“8. That as to the use of the trade name ‘Safeway’ in California, he says:

“A. That from 1925 until in the early part of 1941, Safeway of California operated in California retail grocery stores primarily under the name of ‘Safeway,’ although in some cases the name ‘Safeway Stores,’ ‘Safeway Stores, Incorporated,’ [60] or ‘Safeway Stores, Inc.,’ were also used; that some stores, when first acquired by Safeway

(Testimony of Henry J. Ludke.)

of California, were operated under names other than 'Safeway'—for example, in about 1929, Safeway of California acquired the assets and business of a chain of retail stores in California operating under the name of 'Piggly-Wiggly,' pursuant to franchise from the Piggly-Wiggly Corporation; Safeway of California made other acquisitions, such as the acquisition of the assets and business of MacMarr Stores, Inc., and its subsidiaries in 1931. As a result of these acquisitions, the trade names, 'Piggly-Wiggly' and 'MacMarr' were continued in use on the stores so acquired for some time, but gradually the use of all trade names other than 'Safeway' was discontinued;

"B. That from the early part of 1941 until its dissolution as of the close of business on December 31, 1942, Safeway of California operated in California retail grocery stores under the trade name 'Safeway' alone;

"C. That from 1934 until in the early part of 1941, Safeway of Nevada operated in California retail grocery stores principally under the trade name 'Safeway'; other trade names were sometimes used as a result of acquisitions of other chains as was done in the case of Safeway of California above set forth;

"D. That from the early part of 1941 until its dissolution as of the close of business on December 31, 1942, [61] Safeway of Nevada operated in California retail grocery stores under the trade name 'Safeway' alone;

(Testimony of Henry J. Ludke.)

“E. That commencing on January 1, 1943, and continuously ever since, Safeway of Maryland has operated in California retail grocery stores under the trade name ‘Safeway’ alone.”

So that the substance of that is that this would be the predecessors in interest, or the wholly-owned subsidiaries of the plaintiff have used the name “Safeway” continuously from 1925.

The Court: Mr. Sterry, according to the affidavit, in 1925 there was an amendment of the articles of incorporation where the name was changed to Safeway Stores. Can't you get the records of this corporation so we can see what the amendment was and when it was made?

Mr. Sterry: Yes; I can get it, but not before tomorrow night.

The Court: The records are here in town?

Mr. Sterry: I don't believe so. They are all in Oakland. The main office of the company is in Oakland. I don't think any of the records are here. In fact, I am quite sure they are not. I hadn't supposed that was necessary because the affidavit states since 1925 we were continuously advertising under the name Safeway up until about some time—the date slips me, but they have occasionally used other names. [62]

The Court: If counsel will stipulate that is true, I won't require it. This is in the nature of an affidavit.

Mr. Sterry: But, if your Honor please, it is perfectly common practice, at least it has been the ex-

(Testimony of Henry J. Ludke.)

perience of my office, to ask for admissions, and to set out the admissions as stating a fact.

The Court: The admission says thereabouts. I want to know the month in 1925. I want to know when in 1925.

Mr. Sterry: If your Honor please, I can't see what difference it makes whether it was in March of 1925 or December, 1925.

The Court: It may not make any difference if it was in 1925, but I want to be certain it was in 1925.

Mr. Magid: If your Honor please, I might call to Mr. Sterry's attention that the Safeway Cleaners and Dyers filed a certificate of doing business in the County of Los Angeles, County Clerk's Office, April 4, 1925, and that is part and parcel of the court's records by stipulation, so it may be very pertinent.

The Court: It may be very important, Mr. Sterry. If two people are using a name, can a person then appropriate that name?

Mr. Sterry: If your Honor please, the defendant wasn't in business in 1925. The defendant started in recently. The stipulation on file is that the first four names in the [63] list here are——

The Court: Predecessors of the plaintiff.

Mr. Sterry: The first certificate filed in the County Clerk's office, according to the stipulation, is Safeway Stores, Incorporated, February 24—no; that isn't right.

Mr. Whelan calls my attention to the fact that the stipulation is that the first four names listed are

(Testimony of Henry J. Ludke.)

those of the plaintiff or predecessors in interest, and the plaintiff succeeded to all rights in said predecessors in interest. The first one in point of time filed with the County of Los Angeles Clerk under the name Safeway was the plaintiff or one of its predecessors in interest.

The Court: That might be your stipulation, but we have also another which shows Safeway Cleaners and Dyers was in business April 4, 1925.

Mr. Sterry: What of it, if your Honor please? Safeway—

The Court: May I suggest something to counsel?

Mr. Sterry: Yes.

The Court: I am certain that if you go down to the telephone company's office, you can find a directory for 1925. I would like to know if the telephone directory of 1925 showed any Safeway names, including Safeway Cleaners and Dyers and Safeway Food Stores. It may be that Safeway Food Stores wasn't even in the telephone directory in 1925. [64]

Mr. Sterry: I know, but, if your Honor please, if we can show that it obtained a secondary meaning at the present time, I don't care whether anyone used it or not. Under the decisions, we have a right to protection.

The Court: Mr. Sterry, I am not arguing the law at the present time. I want to know what the facts are. You may think this fact is not material. I don't know whether it is material or not, but I would like to have it before we get into a discussion of the law. I would like to know what day,

(Testimony of Henry J. Ludke.)

actually what day the Safeway Food Stores started using the word Safeway, and I would like to know in 1925 if another company was using the word Safeway, other than the Cleaners and Dyers and Safeway Food. I will ask counsel for the defendant, will you check the telephone directory?

Mr. Magid: I shall call the Telephone Company, your Honor. If we might take a five-minute recess, perhaps they can tell us whether those books are available.

The Court: We are going to recess for the day pretty soon. I am satisfied they have got a directory for 1925. You go down and look at it.

Mr. Sterry: If your Honor please, you evidently will be better satisfied if I have Mr. Wilde down here. He has been the secretary and he can probably answer those questions, but I can't possibly have him here by tomorrow. I can have him here Tuesday, or any other date. [65]

The Court: Mr. Sterry, I have got other cases set for next week. I rushed this case so I could try it this week. I have another case that I continued to give you preference. I am satisfied with this affidavit, but I want to know definitely. Maybe the telephone directory won't show there was a Safeway grocery in Los Angeles in 1925, but we may have other Safeway names in the directory in 1925. All we have here is what was in the County Clerk's Office. All fictitious names are not filed in the County Clerks' Office.

(Testimony of Henry J. Ludke.)

I don't know for sure, but I think one of the controlling factors in this case is going to be whether or not the plaintiff was the first user of the word Safeway. If the plaintiff was the first user of the word Safeway, it may have developed a secondary meaning of the word Safeway so as to exclude the word Safeway in any other line of business. But that is another problem.

Mr. Sterry: If your Honor please, under the authorities as I see them, if you develop a secondary meaning of a word, you are entitled to protection, especially against a secondcomer.

The Court: Mr. Sterry, unfortunately, or fortunately, I have a jury that is out, and I will probably have to stay here for another couple of hours or three hours or longer. That is going to give me an opportunity to read the trial brief, so I am going to read your trial brief. [66]

Mr. Sterry: Your Honor reads faster than I do, but I might say——

The Court: I may not read it all, but at least I will look over it and know what is in it.

Mr. Sterry: If your Honor please, may I make a suggestion to your Honor, and that is that you will find a heading in the index——

The Court: I will read your points and authorities. I can go over them pretty fast.

Mr. Sterry: So far as the use of the name by others, I know of no authorities contrary to those cited.

The Court: The court will stand in recess now until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., Friday, May 25, [67] 1956.)

Friday, May 25, 1956—10:00 A.M.

The Clerk: No. 17553-HW Civil, Safeway Stores, Incorporated, v. Safeway Furniture Company, Inc., et al., further trial.

The Court: I think before we start this morning I can limit the issues in this case. I have had a chance, Mr. Sterry, to go over your brief, your trial brief, and to read some of the cases cited therein. I told you yesterday that I was familiar with the rule of unfair competition, that I had tried several cases in this court concerning that question.

In your brief you cite the case of Phillips v. The Governor & Co., 79 Federal Reporter (2d) 971. The court says this:

“Inasmuch as the defendant sells his fur products direct to the retail trade and the plaintiff sells no fur products to the retail trade in the United States, the defendant contends there is no competition between them and therefore there can be no unfair competition.”

This is the important part: “This court, however, has carefully considered the question in *Del Monte Special Foods Company v. California Packing Corporation* and held that the two products need not be competitive.”

I was familiar with the Del Monte Food Case. However, [69] I don't think that the Del Monte Food case is as emphatic as the court is in the Phillips case.

That seemed to have been the rule, but it seems to me that this rule has been modified by two recent decisions of the Ninth Circuit. I called your attention yesterday to the Fairway Foods case, which was tried in this court some time ago, in which the Circuit wrote an opinion on November 9th of last year. That was the case in which the Fairway people had established a secondary meaning of the name Fairway in the Middle West. They had never come out to California.

A store, a food store was established here in Los Angeles and used the word Fairway, and they came out here and tried to restrain the local Fairway from the use of the name Fairway.

Now, they said that they were competitive, although I found against them, and the finding was upheld by the Circuit.

One of the things in that case that I am interested in was that they said, "Well, we expect to extend our activities into California. We never have been in California, but we expect to extend our activities into California."

The Ninth Circuit in that case, Judge Stephens wrote the opinion, Judge Stephens says:

"We gain from the record that the judgment is based upon the court's view of the law that whether or not the marks [70] are valid under the statute, they do not and cannot be effective as against the

defendant for the reason that the facts of the case do not show any competition or likelihood of competition or dilution of plaintiff's goodwill."

I still say that under this particular opinion the competition is still one of the elements to be considered.

Now, relative to the question of future activities, in that particular case I found in favor of the local Fairway store and also I went one step further and said:

"Inasmuch as the Fairway chain intimates that they expect to come into California I would restrain them from interfering with the local Fairway people if they did come."

Now, Judge Stephens says, "Government by injunction is never favored and the discretion of the chancellor in favor of granting the writ is withheld except to prevent impending injury or wrong and is not granted upon indefiniteness and remote possibility. It may be that if and when plaintiff acts to carry out the expressed intentions to expand into the territory previously occupied by the defendant the facts will be sufficiently different from those of the instant case as to commerce and otherwise and as to validity of the claimed trademark as to present additional and different issues."

The Circuit reversed me because I had given the restraining order, restraining some future activity. [71]

I bring that out because of the statement you made yesterday to the effect that the Safeway people expect to go into the furniture business.

Now, the latest case, latest decision on this matter is another case that was tried in this court. It is not even in the bound volumes yet. It is in the Advance Sheets. It was decided December 13, 1955. It is Wian Enterprises vs. Persinger. Now, in that case the plaintiff had established a drive-in series of restaurants known as Big Boy, and they had had a sandwich that they called the Big Boy sandwich.

Mr. Sterry: I am entirely familiar with the Big Boy case.

The Court: I am going to read what the Circuit has to say about the case. The defendant in that case commenced to manufacture barbecue equipment under the name of Big Boy Manufacturing Company, and the Big Boy restaurants filed an action to restrain the defendants upon the ground that there was unfair competition, that they specialized in hamburgers and the cooking of hamburgers, and here was a manufacturer that was making barbecue equipment on which hamburgers could be cooked, and consequently there was such a close relationship that there would be unfair competition.

Well, I held as a matter of law that there was no unfair competition. An appeal was taken and I was reversed. But this is what the Circuit said in the reversal: [72]

“There seems to be little likelihood of confusion of identity of product.”

Well, now, if the rule as laid down in the Phillips case, that the two products didn't have to compete is right, why would it make any difference whether

there was any likelihood of confusion? The articles didn't have to compete, but the Circuit says:

“There seems to be little likelihood of confusion of identity of product, but upon a trial there may be some proof of confusion of source that entitles plaintiff to some relief.”

So I think that the rule laid down in the Phillips case and in the Del Monte case has been modified by these two later decisions of the Ninth Circuit, and it is not the rule now that the products don't have to be in competition. I think there has to be some competition between the people.

Now, I may be wrong. But it seems to me from a reading of these two latest decisions that the Circuit is holding that there must be some competition.

Mr. Sterry: If your Honor please, I have considered both those cases. I think they have no application to this case. Of course, quite often court and counsel disagree, and that is what your Honor is there for. I trust you will give me an opportunity to fully discuss those cases and show their inapplicability. [73]

The Court: Well, I don't expect, Mr. Sterry, to decide this case from the bench. I expect to take it under submission when I find out what all the facts are, but I am calling your attention to the two latest cases.

Now, in your case that you cited, Great Atlantic & Pacific Tea Company vs. A. & P. Radio Stores, this was the District Court of Eastern Pennsylvania. This was a District Court case. But, however, in that case the plaintiff was engaged in the sale of

food and household appliances. The defendant was engaged in the business of selling new and second-hand radios, washing machines, electric refrigerators.

Now, if the rule as laid down by these other cases is the rule in California, I think that you are correct in saying there doesn't have to be any competition, but whether or not that is the rule in California is something that we are going to have to determine.

Mr. Sterry: All right. If your Honor please, may I make one practical suggestion?

The Court: All right.

Mr. Sterry: I always appreciate a judge calling my attention to decisions that he thinks are contrary or may be contrary. I assure your Honor I had read both of those.

As far as the Big Boy case was concerned, I knew about it when your Honor was there, and I advised the counsel for the appellants not to raise this question of lack of competition, [74] because in that case I think there had to be, but I don't want to enter into an argument now.

The point is we had our advertising manager on and your Honor raised the question then as to an issue which is not raised by the pleadings, but I have two or three businessmen who are very anxious to get away. They will take about 10 minutes apiece.

The Court: Let's get them on, then.

Mr. Sterry: I should like to put in their testimony and then discuss it orally or write a brief or anything else.

The Court: Call them in and let's have the testimony.

Mr. Sterry: Oh, if your Honor please, there is one thing. You referred to a stipulation yesterday which is not in evidence and was made subject only to its relevancy. It is a stipulation of February 17, approved by your Honor, and in that it lists as the first listings of Safeway Stores, Inc., February 24, 1955. It should be February 24, 1925. Mr. Magid will so stipulate.

The Court: February what?

Mr. Sterry: 1925 instead of 1955, a difference of only 30 years.

The Court: Well, that helps the court immensely.

Mr. Whelan: Is that agreed to? Is that correct?

The Court: Is that page 2, line 8? [75]

Mr. Sterry: Page 2, line 8.

The Court: That ought to be 1925?

Mr. Whelan: 1925, your Honor.

The Court: All right. I will change it.

Mr. Sterry. I don't want to be technical. The stipulation is subject to objections, but the facts are there. and I want to object to it, but when it was called to my attention, it threw me for a loop yesterday, and I think it did your Honor.

Mr. Whelan: May I ask if Mr. Magid agrees?

The Court: Will you stipulate?

Mr. Magid: That is so stipulated. I would like to make this remark at this time, your Honor, if I may. It will take just a moment.

In accordance with the court's direction——

Mr. Sterry: Now, wait a minute. I want to get our witnesses in and get their testimony.

The Court: Just hold that until the witnesses have testified.

Mr. Sterry: We will have no objection about the facts, but I do want to make a record, Mr. Magid.

Will you take the stand? Your Honor hasn't any objection to my withdrawing the witness I was examining, have you?

The Court: Absolutely none. I am interested in the [76] facts, Mr. Sterry, more than anything else. Then later we can discuss the law.

Mr. Sterry: I appreciate that, your Honor, but judges vary and some of them don't like to have witnesses withdrawn.

W. A. CHRISTENSEN

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: You may be seated, and will you please state your name?

The Witness: W. A. Christensen.

Direct Examination

By Mr. Sterry:

Q. Mr. Christensen, will you please try to keep your voice up? I don't know why, but the man who built this room evidently tried to deaden sound as much as possible.

Where do you live, Mr. Christensen, at the present time?

(Testimony of W. A. Christensen.)

A. Currently, I am living at the Del Capri Hotel.

Q. In Los Angeles?

A. In Los Angeles, yes.

Q. Are you connected with the plaintiff in this action, Safeway Stores, Incorporated? [77]

A. Yes, sir.

Q. What is your position with that company?

A. My position is referred to as distribution division manager.

Q. For what division?

A. The Los Angeles division.

Q. When did you take that position officially?

A. May 7.

Q. Of this year? A. This year, 1956.

Q. Before that, had you been connected with the plaintiff? A. Yes, sir.

Q. Approximately, just approximately how long? A. 33 years.

Q. Before you came here, immediately before you came here, what had been your position with the defendant?

A. I held a similar position in Oklahoma. It was referred to as the Oklahoma City distribution division manager. That comprised the states of Oklahoma, Arkansas and the Panhandle of Texas.

Q. I think one of our witnesses yesterday filed an exhibit with stipulation of counsel and permission of court in which there were shown certain non-food items purchased by him or by the division of Safeway whose name I forget, that showed [78]

(Testimony of W. A. Christensen.)

several cities, and he stated they were all in the division, that each division is a city. Is that correct?

A. Well, not necessarily. A division includes a number of states.

Q. I understand, but I forgot to prove that by the witness yesterday. Will you look at No. 4 and state if all the cities there are not the ones where the particular divisions are located?

A. That is where the division headquarters are located, yes.

Q. That is what I mean. A. Yes, sir.

Q. How long have you been division manager in Oakland, or were you before you came here, Mr. Christensen? A. In Oklahoma?

Q. In Oklahoma, I mean.

A. About 12 years.

Q. So that you will understand the question, it has been stated that a very slight amount of the non-food items listed in Exhibit 4 have ever been handled in the Los Angeles division up to date. I want to ask you if you intend to handle any of those articles, or all of them, or any part of them?

Mr. Magid: That is objected to, if your Honor please, on the ground it calls for a conclusion of this [79] witness. It is not shown that this witness is an executive officer of the corporation, and that even if he does so intend to, that could have no binding effect upon the plaintiff corporation.

The Court: Overruled. You may answer.

The Witness: I am not familiar with Exhibit 4.

(Testimony of W. A. Christensen.)

Q. (By Mr. Sterry): Well, just look at Exhibit 4. I thought I showed it to you in my office.

The Court: May I ask this witness a question?

Mr. Sterry: Certainly, your Honor.

The Court: Does Safeway Stores intend to go into the furniture business here in Los Angeles? When I say furniture business, I mean the common, ordinary understanding of the word furniture.

The Witness: I think I understand what you mean. In other words, go into the general line, start selling a general line of furniture? We do not intend to do that.

The Court: You intend to sell special articles?

The Witness: That's right. We will sell first one thing and then another in the furniture line. We have been doing that in the past where I came from.

The Court: Look at the exhibit and then you can answer the question.

The Witness: I wish you would restate the question, please. [80]

The Court: Read the question.

(Question read.)

The Witness: We will likely handle—we will, I won't say likely, we will handle some of them, probably not all of them, because these items change from time to time, and they don't become identical, but as far as handling lawn chairs and metal TV tables and clothes baskets, step stools, such items as are listed in this Exhibit 4, we will be handling them from time to time, yes, sir.

(Testimony of W. A. Christensen.)

Q. (By Mr. Sterry): When you handle them, will you advertise them or not?

A. We will. We will advertise them.

Q. You have said you handled those items or many of them in your former division?

A. That is correct.

Mr. Sterry: I have some advertisements here from Oklahoma. If your Honor please, so that both you and counsel will understand, I do not contend that in California advertisements there would be binding. I have got a mass of them. I am taking a few to illustrate. I want to ask him if he intends to have substantially the same advertising here.

The Court: Mr. Sterry, under the Fairway case I don't think it makes any difference, because I am going to follow the rule in the Fairway case. However, I want to let [81] you make your record. The fact that they intend to enter into business doesn't make any difference. That is what I tried to do in the Fairway case and the Circuit said I couldn't do it. As long as that decision stands, I feel I am bound by it. However, I will let you make the record. You can go back and present it again in the Circuit and maybe they will change their mind.

Mr. Sterry: If your Honor please, I trust you will give me a chance to try to point out a very vast difference between the Fairway case and this. As a matter of fact, when I read it, I thought it had nothing to do with this case. I am perfectly frank to tell your Honor this. There are many cases similar to the Fairway case, but if your Honor will

(Testimony of W. A. Christensen.)

pardon me, I don't want to discuss it until I have put on the witnesses.

The Court: I want you to make your record. Go ahead and make your record.

Mr. Sterry: May I show this to counsel?

(Handing documents to Mr. Magid.)

Mr. Sterry: What is our last number?

The Clerk: Five.

Mr. Sterry: Will you mark these 5-A, -B, -C, and so forth?

The Court: They may be marked for identification only. [82]

Mr. Sterry: For identification only. I could add a great number more, but I think four or five of them is just as good.

The Clerk: 5-A to 5-F for identification.

(The exhibits referred to were marked Plaintiff's Exhibits Nos. 5-A through 5-F for identification.)

Q. (By Mr. Sterry): Will you look at 5-A to 5-F?

(Handing documents to the witness.)

A. Yes, sir.

Q. Are those correct microfilms or photographs, whatever process it is, of advertisements you ran in the papers in Oklahoma?

A. Yes, I would say those are true copies.

Mr. Magid: If your Honor please, we will object

(Testimony of W. A. Christensen.)

at this time to any queries concerning these exhibits for identification, on the ground, first, that they are not the best evidence, the best evidence being the newspapers themselves.

The Court: Overruled.

Q. (By Mr. Sterry): Now, I will ask you if you intend in handling these furniture items to advertise them in a similar manner here.

Mr. Magid: We object to that question on the ground that it calls for a conclusion on the part of this witness. We are getting into the realm of speculation. It [83] is not within the issues of this case.

The Court: Overruled.

The Witness: Yes, sir. We will handle them.

Mr. Sterry: Now, if your Honor please, I offer these simply as illustrations.

The Court: May I see the exhibits, please?

Mr. Magid: May I interrupt the court?

The Court: Yes.

Mr. Magid: Mr. Sterry said to the court we would be but ten minutes with these witnesses. I started to say at a quarter after 10 that pursuant to the court's instructions yesterday, we went to the telephone company library.

Mr. Sterry: Wait a minute. I do not want to stipulate that until I have a chance to object to it.

The Court: Just a minute. These exhibits may be received in evidence.

The Clerk: Exhibits 5-A to 5-F.

(Testimony of W. A. Christensen.)

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits Nos. 5-A to 5-F.)

Mr. Magid: If your Honor please, what I am trying to tell the court is that I promised to call the legal counsel for the telephone company by 10:30 so that he could give us certain additional information, if it is still available in their records. I think as a courtesy to counsel for the telephone company, I should keep my appointment with him. [84]

The Court: We will keep it in mind. You may proceed.

Mr. Sterry: Mr. Whelan calls my attention to the fact that he didn't think the answer was responsive. May I have the last answer of the witness read?

The Court: Read the answer.

(Answer read.)

The Witness: We will sell and advertise them. Is that more responsive?

Q. (By Mr. Sterry): What I meant is your advertisements will be substantially along the lines of these exhibits that have just been introduced in evidence.

A. A similar type of advertising, yes. The fact that we will advertise them is probably the answer you will be interested in.

Mr. Sterry: That's all. You may take the witness.

The Court: Any questions?

(Testimony of W. A. Christensen.)

Cross-Examination

By Mr. Magid:

Q. Mr. Christensen, in Oklahoma did you ever sell in the plaintiff stores any living room furniture?

A. Yes, we have sold pieces of living room furniture.

Q. What kind?

A. We have sold wrought iron hassocks. We have sold [85] TV tables.

Q. Did you sell television sets?

A. No, sir.

Q. Did you sell any couches?

A. No, we haven't sold any couches.

Q. Do you intend to sell couches?

A. No, I certainly don't.

The Court: This witness has testified they don't intend to go into the general furniture business.

Q. (By Mr. Magid): Have you ever visited the store of the Safeway Furniture Company in Van Nuys?

A. No, sir, I have not.

Q. Have you seen any of their advertisements?

A. Yes, I have seen some of them.

Q. Have you noticed any that have advertised any of the products that you have sold, are now selling, or intend to sell?

A. I did not scrutinize those ads with the thought in mind of comparing items that we had advertised with the articles that you are advertising

(Testimony of W. A. Christensen.)

or had advertised in your advertisements, but I would be glad to review them.

Q. Here are your Exhibits 1, 2 and 3.

The Court: I suppose it can be stipulated that the defendant does not sell food products or meat or vegetables, Mr. Sterry? [86]

Mr. Sterry: There is no issue on that point.

The Court: The only thing he sells is furniture.

Mr. Sterry: Yes.

The Court: That is correct, isn't it?

Mr. Sterry: Yes.

The Witness: Is it just the one ad?

The Court: Just the one ad.

Q. (By Mr. Magid): In the top page of each newspaper? A. Yes. I see one item here.

The Court: On what exhibit is that?

The Witness: On Exhibit 1, depicting a kitchen stool that appears to be identical with some that we have sold in Oklahoma in the past.

Q. (By Mr. Magid): That is part of a set, is it not?

A. Yes. It indicates it is advertised as part of a breakfast set.

Q. Part of a set?

A. Yes. Again, as in Exhibit No. 1, I note that there is a coffee table that appears to be a part of a living room suite that is quite a bit like some that we have advertised.

Q. Will you refer to Plaintiff's Exhibit 4 and

(Testimony of W. A. Christensen.)

show us where in that list there is a coffee table anywhere in the United States sold by plaintiff?

A. I did not mean to say that these items I refer to in the Safeway Furniture Company ads had been advertised in [87] Exhibit 4. I only said we had sold and advertised them in the division where I came from.

Q. Show me where in Plaintiff's Exhibit 4 it is listed, if it is.

A. Again, I did not intend to say that they were advertised in Exhibit 4. I only said we had advertised them, but you will have to take my word for that, or strike it out, either one.

Q. In other words, the list that is Plaintiff's Exhibit 4 is not correct?

A. I didn't say that. I think those are photo-static copies and true copies of our ad, but they don't comprise all the ads we have run.

Q. This is Plaintiff's Exhibit 4? A. Yes.

Q. Introduced by Mr. Sterry?

The Court: He doesn't say it is wrong. He says maybe they didn't have all the items in Exhibit 4.

The Witness: That is correct. That's right.

Mr. Sterry: If your Honor please, I believe the witness, whose name I forget, that identified Exhibit 4, stated those were the items he purchased, and that each division had a right to purchase additional items. If that is not so, I shall ask this witness.

The Court: I think that is true, but that is [88] the list we have before us.

(Testimony of W. A. Christensen.)

Mr. Magid: I have no further questions for this witness.

Mr. Sterry: I want to clear that up, your Honor, with one question.

Redirect Examination

By Mr. Sterry:

Q. Is it or is it not true, Mr. Christensen, each manager of a division has the right to purchase from other sources? A. Any store?

Q. Yes.

A. Yes, we can purchase from whomever we choose.

Q. And did you in Oklahoma purchase from others?

A. Yes, sir, we did, other sources, occasionally, yes, I did.

Q. I want to ask one question which I think is self-serving. You told the court you did not intend to go into the furniture business. By that you mean the operation of a furniture store as such?

A. That is correct.

The Court: Well, now, let's get this straight. You don't intend to go into the furniture business by placing the ordinary run of furniture in the Safeway Grocery Stores, [89] do you? You wouldn't intend to put in living room sets and dining room tables, chiffoniers, rockers?

The Witness: No.

The Court: In a grocery store?

(Testimony of W. A. Christensen.)

The Witness: No.

The Court: All right.

Q. (By Mr. Sterry): But you do intend to carry similar items?

A. That are carried in furniture stores, yes.

Q. That you did in Oklahoma?

A. Oh, yes, we will stock those items from time to time. In fact, we are in the process right now of buying some.

(Witness excused.)

The Court: Now, Mr. Sterry, we have got the general counsel of the telephone company here. I am sure he is not interested in the question of unfair competition, because he doesn't have any unfair competition. He is a monopoly. Suppose we let him come in and give his testimony. Do you have any objection?

Mr. Sterry: I wouldn't think of it. Due to the courtesies extended to me, it would be very unusual if I did. I didn't know the counsel for the telephone company was here.

The Court: I didn't know he was either, but I have counsel's word for it. [90]

Mr. Magid: No, your Honor, he isn't here. He is waiting for my call.

The Court: I thought he was in the courtroom.

Mr. Magid: No. He is waiting for me to call him back, and I promised I would call him at 10:30.

Mr. Sterry: Mr. Magid was going to telephone him, and I suggest he do it at the ordinary recess.

(Testimony of W. A. Christensen.)

Mr. Magid: I promised I would call him because the court wanted it for his information.

The Court: I thought he was here in court.

Mr. Magid: No, your Honor.

The Court: All right. Go ahead, Mr. Sterry.

Mr. Sterry: Mr. White, will you take the stand?

S. M. WHITE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: S. M. White.

The Clerk: W-h-i-t-e?

The Witness: Yes.

Direct Examination

By Mr. Sterry:

Q. Mr. White, do you reside in Los [91] Angeles? A. Yes, sir.

Q. Where? A. At 3961 Dublin Avenue.

Q. How long have you lived here?

A. I have lived in Los Angeles since 1921.

Q. What is your occupation, if any?

A. I am the secretary-manager of the Southern California Retail Grocers Association.

Q. What is that association?

A. That is an association composed of principally individual or so-called independent retail operators of grocery stores and markets.

(Testimony of S. M. White.)

Q. Just approximately how many members have you?

A. Between fourteen and fifteen hundred.

Q. How long have you been secretary of that?

A. Since 1932—24 years.

Q. Before that, were you in the grocery business?

A. From 1921 to 1932, I was operating a retail market.

Q. Since 1934 as secretary, what has been your duty with reference to keeping informed with reference not only to the retail—

May I withdraw that, your Honor?

Does that include wholesalers of grocery products as well as retailers, or only retailers?

A. Only retailers. [92]

Q. Only retailers? A. Yes, sir.

Q. Will you tell the court what your duties as secretary of the association have been with reference to causing you to keep in touch with the general business retail methods of grocers and other retail concerns?

A. As secretary of this trade association, it is my duty to keep in contact as often as I can with the members of our organization. We publish a magazine which goes out weekly, in which we attempt to keep our members informed on matters that would be of interest to them in the trade, merchandising, and otherwise.

Q. During the time you have been secretary,

(Testimony of S. M. White.)

have you ever heard the plaintiff corporation referred to by other than the word Safeway?

A. No, sir, I don't believe so.

The Court: Mr. Sterry, I think that I can take judicial notice of the decisions in this district, and I don't think there is any question in my mind that Safeway has established a secondary meaning within this district of the word Safeway in the food market, within the grocery trade. I don't think there is any question about that. I don't think you have to establish the fact that there is a secondary meaning. I will take judicial notice from the cases that have been decided. [93]

Mr. Sterry: All right.

The Court: You have cited several cases here in this district, and I am satisfied that the word Safeway has a secondary meaning in this district in the food business. I am perfectly willing to go that far with you.

Mr. Sterry: All right.

The Court: You don't have to establish the secondary meaning.

Mr. Sterry: I will not pursue that any further, then, if your Honor please. I may make this statement: Your Honor yesterday referred to the stipulation which, as I called your Honor's attention to, has not been admitted and is subject to the objection. That stipulation is in two parts. It is subject to our objections which we are going to interpose as to the number of registrations of fictitious names since 1925.

(Testimony of S. M. White.)

The Court: Don't argue that question here.

Mr. Sterry: No.

The Court: Let's get rid of the witness.

Mr. Sterry: I understand, but the second part of it is the number of listings at the moment, and it is only to that portion that I want to address one other question.

The Court: If he has any knowledge of the other listings——

Mr. Sterry: That is it exactly. In other [94] words, I only made the statement so that your Honor wouldn't think I was waiving the admissibility of the first part of that stipulation.

Q. Now, Mr. White, either now or during any of the time that you have been secretary of this association, have you ever heard or known yourself of any other persons or concerns, by that I mean corporations or partnerships, doing business under the name of Safeway, other than the plaintiff?

A. To the best of my knowledge, I believe not, sir, until this matter was brought to my attention.

Q. If there has been it has been so slight it didn't register with you? A. That is correct.

Mr. Sterry: Mr. Whelan calls my attention, if your Honor please, to this, and I want to make the same offer of proof with reference to the confusion of the advertisements of the Safeway that have been introduced in evidence that I made to Mr.——

The Court: The advertisements speak for themselves. They are before the court.

Mr. Sterry: Your Honor, I submit to your rul-

(Testimony of S. M. White.)

ing. I am not trying to get your Honor to reverse it. I am simply saying I want to make the same offer now, and I assume your Honor will sustain an objection.

The Court: Same ruling, Mr. Sterry. [95]

Cross-Examination

By Mr. Magid:

Q. Mr. White, where is your office?

A. At 1206 Maple Avenue.

Q. Have you ever had occasion to visit the town of Van Nuys where Safeway Furniture Company is located?

A. I have been in the town on some occasions, not often.

Q. Have you ever been on Van Nuys Boulevard and Victory Boulevard in Van Nuys?

A. Yes, sir.

Q. Have you ever visited the Chamber of Commerce in Van Nuys? A. No, sir.

Q. Have you ever seen the Safeway Furniture Company store in Van Nuys?

A. I have no recollection of it, sir.

Q. You never went into that store, did you, that you know of? A. No, sir.

Q. Did you ever go into a Safeway Store and try to buy any furniture?

The Court: That is not proper cross-examination now. This witness didn't say anything about furniture at all.

Q. (By Mr. Magid): Your members, inde-

(Testimony of S. M. White.)

pendent grocers, [96] which are retailers only, are there any of them by the name of Safeway other than the plaintiff in combination with any other name? A. No, sir, I don't think so.

Q. Is the plaintiff a member of your organization? A. No, sir, they are not.

Q. You know that their name is Safeway Stores, Incorporated, do you not?

A. Yes, I am familiar with the name.

Q. And it is not merely Safeway?

A. That's right.

Q. As secretary of this organization, you know the real name of the plaintiff in this case?

A. Yes, sir.

Q. Did you ever hear the plaintiff referred to as Safeway Stores?

The Court: What difference does it make whether it is Safeway or Safeway Stores? The thing we are interested in here is Safeway. It doesn't make any difference, as far as I am concerned, whether they were known as Safeway Stores or Safeway.

Mr. Magid: I have no further questions of this witness.

The Court: You may step down.

(Witness excused.) [97]

Mr. Sterry: Mr. Carothers, will you take the stand?

JAMES H. CAROTHERS

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you spell your last name?

The Witness: James H. Carothers.

The Clerk: Will you spell your last name?

The Witness: C-a-r-o-t-h-e-r-s.

Direct Examination

By Mr. Sterry:

Q. Mr. Carothers, where do you live?

A. At 5210 Village Green, Los Angeles 16.

Q. How long, approximately, have you lived here?

A. I have lived in Southern California since 1920, and in Los Angeles for the major portion of that time.

Q. Mr. Carothers, what is your occupation?

A. I am president of the Food Employers Council, Incorporated.

Q. That is a non-profit organization?

A. Correct.

Q. Its purpose is what?

A. Is to negotiate labor contracts with the unions for the employers and to police those contracts after they [98] have been negotiated.

Q. Is the plaintiff, Safeway Stores, Incorporated, a member of that council?

A. They are, sir.

Q. How long have you been in that organization?

(Testimony of James H. Carothers.)

A. Three and a half years, approximately.

Q. Before that, what was your occupation?

A. I owned a food brokerage business in Los Angeles, operating in Southern California.

Q. How long had you operated that, approximately?

A. Five years.

Q. During those five years, due to the statements of the court I am confining my question to one thing, during the time that you have been in business by yourself and for the Food Employers Council, have you ever heard of any other concern, and by concern I include persons, corporations or partnerships, that were operating here under the name Safeway other than the plaintiff?

A. It seems that I have seen the name Safeway on a moving van at some time or other.

Q. Have you ever heard of a company operating and advertising under the name Safeway?

A. Not to my knowledge.

Q. If you did, it is so slight it didn't make any impression? [99]

A. Yes, sir.

Mr. Sterry: No further questions.

Cross-Examination

By Mr. Magid:

Q. Mr. Carothers, have you ever heard of the Safeway Furniture Company?

A. The first time I heard of Safeway Furniture Company, to my knowledge, was in Mr. Sterry's office.

(Testimony of James H. Carothers.)

Q. Did you ever hear of Safeway Finance Company? A. Not to my knowledge.

Q. Ever had any dealings with a finance company named Safeway?

A. Not to my knowledge.

Q. Did you ever, by chance, pick up a telephone directory and look under the name of Safeway?

A. Yes, I believe I have looked in the telephone directory for Safeway.

Q. And have you seen any other Safeways besides Safeway Stores listed?

A. Not to my memory, sir.

Q. Did you ever look in the 1955-56 Central Directory under the Safeway listings?

A. No, I believe not, sir.

Q. You believe you have? [100]

A. I believe not.

Q. What telephone directory have you looked at? A. For the Safeway Stores.

Q. Under Safeway?

A. Some years ago I might have looked in the telephone directory when I was in the food brokerage business to find Safeway's number.

Q. In December, 1954, what business were you in?

A. I was in my present position, Food Employers Council.

Q. Did you by any chance look at any of the five directories of the Los Angeles County telephone companies under the name Safeway?

A. Not to my recollection.

(Testimony of James H. Carothers.)

Q. Where was this Safeway moving van that you noticed? Do you recall whether that was in Los Angeles?

A. I couldn't say correctly that it was in Los Angeles. It seems to me that when Mr. Sterry asked me that question that I had at some time in the past seen a moving van with the name Safeway on it.

Q. And it impressed the Safeway so that you could now recall it?

A. No, not definitely, but it seemed to me I had possibly seen it.

Q. You don't have any dealings with unions representing [101] furniture stores, do you?

A. No, sir.

Mr. Magid: I have no further questions.

Mr. Sterry: That's all. Thank you, Mr. Carothers.

The Court: You may step down.

(Witness excused.)

Mr. Sterry: Your Honor please, that concludes our witnesses other than the advertising manager. Would your Honor take the recess now or do you want me to call him?

The Court: We can take the recess now. We will take the morning recess. We will recess until 10 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Mr. Sterry: Will you take the stand?

HENRY J. LUDKE

recalled as a witness herein by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Mr. Sterry: If your Honor please, I want to make a statement for the record. Yesterday afternoon, as I recollect, the witness testified that the company first started advertising, I mean the plaintiff, under the word Safeway in 1926.

The Court: 1926 or 1936? [102]

Mr. Sterry: 1926. If I remember correctly, your Honor asked him exactly what date, and he said he couldn't testify, and then we had some colloquy in which you discussed this stipulation as to the registration of others under fictitious names, which is not yet in evidence, but which the defendant will undoubtedly offer in evidence. Your Honor made the statement that you had been confused—I wouldn't say confused, troubled by the fact that we had stipulated that there were a great number using the name Safeway, and you didn't see how it could be appropriated.

The Court: I know, but yesterday I was under the impression that the Safeway Stores, Incorporated, used the name in 1955.

Mr. Sterry: I understand.

The Court: Now you tell me it was 1925.

Mr. Sterry: Yes.

The Court: So it seems from this stipulation on file that the Safeway Stores used the name first, according to the stipulation.

(Testimony of Henry J. Ludke.)

Mr. Sterry: That is correct, but, also, as a matter of record, I want to call your Honor's attention to the fact that there is no issue as to our having appropriated that name. The allegation in paragraph XII, which is not denied, is that—reading from page 4, line 28:

“Plaintiff in 1926 adopted the arbitrary, [103] coined and distinctive trade name ‘Safeway’ for use by its affiliated retail stores and in its various advertisements. At the time of filing this action plaintiff was, and for some time prior thereto had been, using the name of ‘Safeway’ conspicuously in and around each of its stores and the said name was and is printed in distinctive letters in an oblong sign and against a contrasting background.”

There is no denial of that paragraph at all, except, and I read from the answer, paragraph 5, it denies that plaintiff has acquired all the rights of the trade name of Safeway. That is not a denial by any possibility.

The Court: We have a denial in paragraph 9 that reads this way:

“In answer to paragraph XII, defendants deny that they well knew and now know of the rights plaintiff claims to have in the name ‘Safeway’ and in that connection allege that plaintiff has no more rights to said name than any other person, firm or partnership.”

Mr. Sterry: That is not a denial that we appropriated and used that ever since.

The Court: They don't deny the plaintiff

(Testimony of Henry J. Ludke.)

adopted the name in 1926, but the problem yesterday, Mr. Sterry, was here was an allegation that you had adopted the name in 1926, and the stipulation on file said 1955.

Mr. Sterry: Then all I can say is that it was one [104] of those unfortunate typographical errors that should have been caught, but wasn't.

The Court: If it had been caught, we wouldn't be in this argument, because from the stipulation it appears that Safeway used the name first.

Mr. Sterry: I apologize for our inadvertence in that, and I hope I haven't led the court too far astray.

Direct Examination

By Mr. Sterry:

Q. I was just about to ask you, Mr. Ludke, will you look at Exhibits 1, 2 and 3, showing advertisements of the defendant and advertisements of the plaintiff. The defendant's advertisements are first, and then I want to find your advertisements, and I want to ask you about them. Will you turn to the advertisements of the plaintiff store? One or any of them, they are all the same. There may not be one in that paper. I am looking now at Exhibit No. 2. I will show you the advertisement of the plaintiff appearing in there. Look at No. 2. I will ask you——

Mr. Magid: If your Honor please, if Mr. Sterry will use the lectern, I will be able to hear.

Mr. Sterry: I can't use it and show the things to the witness.

(Testimony of Henry J. Ludke.)

The Court: Will you speak a little louder?

Mr. Sterry: I will try to. [105]

Q. I call your attention to that name Safeway in block letters, and I ask you if that is a character of the way the name has been printed for at least five years last past?

Mr. Magid: That is objected to, if your Honor please, on the ground the advertisements speak for themselves.

The Court: The advertisements speak for themselves. There has been no evidence it was not used. Safeway has a distinctive type, I think.

Mr. Sterry: That is what I am asking.

The Court: Objection overruled. You may answer it.

The Witness: We have used Safeway, not only in a signature cut, but also in type.

Q. (By Mr. Sterry): You didn't answer the question. I am asking you if that is typical of the way Safeway has been used? A. Yes.

Q. I ask you, what is that little circle with the S?

A. That is an insignia we have just adopted in the last few years.

Q. How long, approximately?

A. Oh, I would say two or three years. I don't know exactly when we adopted it. We don't always use it, but sometimes.

Mr. Sterry: I think that's all, your Honor. Counsel may cross-examine. [106]

(Testimony of Henry J. Ludke.)

Cross-Examination

By Mr. Magid:

Q. Mr. Ludke, this signature S that you refer to, has that been copyrighted by Safeway Stores?

A. I don't know.

Q. Has any other store, to your knowledge, ever used it?

The Court: Any other Safeway Store?

Q. (By Mr. Magid): Any other store?

A. Not to my knowledge.

Q. You never saw it in any of the advertisements of Safeway Furniture Company, did you?

A. I haven't—

The Court: Just say if you have seen it.

The Witness: No, I haven't.

Q. (By Mr. Magid): You have seen advertisements of Safeway Furniture Company?

A. Only those shown to me.

Q. Have you ever confused any of your advertising with that of the defendant in this case, Safeway Furniture Store?

A. I would say in some cases there is a similarity.

Q. Will you show us from the exhibits where there is a similarity?

A. I would say this Safeway Furniture Company ad here is quite similar to a retail food ad. [107]

Q. Will you show us in the exhibits which retail food ad that is similar to?

(Testimony of Henry J. Ludke.)

Mr. Sterry: May I ask counsel to ask the witness to identify the exhibit that he was speaking of?

The Court: Yes. What exhibit is that?

Mr. Magid: He refers to Exhibit 2.

Q. Now, showing you Exhibit 1, Exhibit 2, or Exhibit 3, or any other exhibit, which food advertisement is similar to the defendant's advertisement?

A. Of course, there are only two or three here, but from the type, it is similar to some that we use in this ad. We have placed ads that this resembles a whole lot more than this.

Q. Show us one.

A. There doesn't happen to be one here, but there is a resemblance between this type and what we use in the Safeway ad.

Q. You then object to the type that was used in the advertisement?

A. I would say the general makeup of the ad.

Q. And if the general makeup of the ad and the type were changed, then there would be no confusion in your mind, at any rate, between Safeway Stores and Safeway Furniture?

Mr. Sterry: One moment, if your Honor please. Every time I try to examine some witness——[108]

The Court: Just make your objection.

Mr. Sterry: I object to that on the same ground counsel has objected to similar questions of mine.

The Court: What is the objection?

Mr. Sterry: The advertisement speaks for itself.

(Testimony of Henry J. Ludke.)

The Court: Sustained.

Mr. Magid: If your Honor please, that was not the question. The question is if the advertisements were part——

The Court: I think the advertising speaks for itself. I have been in the newspaper business. I know something about advertisements and publications, and so forth and so on.

Mr. Magid: I have no further questions.

The Court: Any other questions?

Mr. Sterry: That's all, if your Honor please.

The Court: You may step down.

(Witness excused.)

The Court: Does the plaintiff rest?

Mr. Sterry: No. You remember I have some questions to ask the defendant in cross-examination. I can introduce a deposition and consider it read in evidence, but I think it will be quicker to get the facts from him.

The Court: I think we better have the defendant testify.

Mr. Sterry: I agree with that, your [109] Honor. Will you take the stand?

MORRIS RUDNER

called as a witness herein by and on behalf of the plaintiff, under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Morris Rudner.

Direct Examination

By Mr. Sterry:

Q. Mr. Rudner, I could cover all the matters, but I think your counsel will want to, so I will try to avoid that, but there are certain facts I want to bring out from you with reference to our inquiry. First, you are one of the defendants named, are you not? A. Yes, sir.

Q. At the present time you are the sole proprietor of this store? A. Yes, sir.

Q. When the suit was brought, according to the admissions of the answer and what you told me in the deposition, your wife and son were partners with you originally?

A. In a corporation in Reseda, not in this store.

Q. Not in this store? [110] A. No, sir.

Q. Well, you had a corporation which is named as defendant, the Safeway Furniture Company, and that was owned by yourself, your son and your wife. That purchased a store? A. Yes.

Q. What was the name of the store when you purchased it?

A. Reseda Furniture Company.

(Testimony of Morris Rudner.)

Q. You changed the name to what?

A. Safeway Furniture Company, Inc.

Q. Is that store operating now?

A. That store has been out for about a year and a half or so.

Q. It is a corporation actively operating?

A. The corporation is deceased.

Q. It is out? A. It is out.

The Court: You mean it is dissolved?

The Witness: Yes.

Mr. Sterry: If your Honor please, I am perfectly willing to accept that. I don't believe they have had any formal dissolution. I think they failed to pay their franchise taxes.

If your Honor please, under this sworn statement, I want to move to dismiss as to the furniture company without [111] prejudice.

The Court: It may be dismissed.

Mr. Sterry: Without prejudice.

The Court: Without prejudice.

Q. (By Mr. Sterry): Now, when did you acquire any interest in the store at Van Nuys?

A. In April, 1952.

The Court: May I ask a question?

The Witness: Yes, sir.

The Court: What was the name of the store you acquired?

The Witness: Safeway Furniture Company.

The Court: From whom did you get it?

The Witness: Frank Keefer and Sam Sims

(Testimony of Morris Rudner.)

owned it, and I bought it with them. They had the name there when I bought it with them.

The Court: You just became a partner?

The Witness: That's right, a general partner.

The Court: A general partner?

The Witness: That's right. They were limited partners.

The Court: Do you know of your own knowledge how long the Safeway Furniture Company had been operating out there in Van Nuys?

The Witness: I understand between a year or two. [112] That's all I know.

Q. (By Mr. Sterry): How long did you continue as a general partner before you bought out the two other partners? A. One year.

Q. One year?

A. One year, sir. By April 1, 1953, I bought the other two out.

Q. You bought the other two out?

A. That's right.

Q. When you bought them out, in your opinion, did the name Safeway Furniture have any value at all?

Mr. Magid: That is objected to, your Honor, as being argumentative.

The Court: Overruled. I guess he had some opinion or he would have changed the name. You may answer.

Read the question.

(Question read.)

(Testimony of Morris Rudner.)

The Witness: They had been operating there for two years, and I would think it would have.

Q. (By Mr. Sterry): Referring again for the moment to the question of no one else being a partner there, let me read your deposition taken some time ago, from page 17.

Mr. Magid: What page is that, Mr. Sterry?

Mr. Sterry: Reading from page 17:

“Q. Since then you have been operating that as your [113] own business?

“A. That is right.

“Q. How about your son; has he any interest in the business with you?

“A. No, sir. May I explain?

“Mr. Magid: No, that’s all.

“The Witness: All right.

“Mr. Sterry: Let him explain. I’d like to get the story.

“Mr. Magid: Just answer the question.

“The Witness: All right.

“Q. (By Mr. Sterry): Go ahead.

“A. I’ll tell you how he came in and how he got out.

“Q. All right.

“A. He got married and I thought he would settle down if I would give him a little partnership. It didn’t last very long, so when they split up and got divorced it was over. That’s what a father tries to do.”

Q. Did you so testify?

A. Yes, sir.

(Testimony of Morris Rudner.)

Q. Then he was a partner with you for a short period of time?

A. A short period of time. [114]

Q. But at the present time neither he nor your wife have any interest in this business?

A. That's right, sir.

Q. You are the sole proprietor of it?

A. Yes, sir.

Mr. Sterry: Then, if your Honor please, I will move to dismiss the other two Rudners without prejudice.

The Court: They may be dismissed.

Mr. Sterry: Without prejudice?

The Court: How about the John Does?

Mr. Sterry: I dismissed as to them yesterday. That is, the dismissal is without prejudice, your Honor?

The Court: Without prejudice.

Q. (By Mr. Sterry): Now, I want to read your deposition to you at page 26. Before I read that to you, how long before you bought an interest in this store had you lived in Los Angeles?

A. Approximately?

Q. Yes. A. About six or seven years.

Q. Six or seven years. At the time you bought in, you knew of the plaintiff corporation, the Safeway Stores, Incorporated, didn't you?

A. I knew of Safeway Stores. I didn't know whether they were incorporated. [115]

Q. You didn't know it under any other name than Safeway, is that correct?

(Testimony of Morris Rudner.)

A. Safeway Grocery is what it went by.

Q. You knew, didn't you, that they had built up a very high and valuable good will under that name?

Mr. Magid: If your Honor please, I think we are definitely getting into the realm of argument.

The Court: Make your objection.

Mr. Magid: I object to the question on the ground it is argumentative.

The Court: Objection sustained. I will take judicial knowledge, Mr. Sterry, that Safeway has built up a valuable asset of good will in this community, extending back over the years 1952, 1953, and before.

Mr. Sterry: I understand, but I still think we have a right to show he knew that. One of our charges is that he adopted this name just for the purpose of trading on it.

The Court: He didn't adopt the name, Mr. Sterry. The name was there. He bought it.

Mr. Sterry: Well, all right, even if he bought it, under the decisions, that is enough.

The Court: He didn't adopt the name. I might ask the witness this question: At the time you bought into this Safeway Furniture Store, you had patronized Safeway Grocery [116] Stores before, hadn't you?

The Witness: Yes, sir, and I do today.

The Court: You still do today?

The Witness: Yes.

The Court: Good stores?

(Testimony of Morris Rudner.)

The Witness: Yes, sir. I told Mr. Sterry they have the best meat. My wife buys all her meat there.

Q. (By Mr. Sterry): Mr. Rudner, I am going to read to you from page 25, starting at line 25, of your deposition. Will you look at that? I will ask Mr. Magid and you to please correct me if I inadvertently omit a word. I sometimes do in reading:

“Q. You allege in your answer that you bought the name and that is a question of law which I am not going to argue with you. Personally, as I understand the situation, there was a partnership running this store out here under that name?

“A. That is right.

“Q. You bought an interest in it?

“A. That is right.

“Q. And then the other partners retired?

“A. That is right.

“Q. All right. Now, what I am asking is not as to your legal right to use that name. That's what this lawsuit is about and Mr. Magid and I probably won't [117] agree. That's why we are having a suit. I am asking you if you thought that 'Safeway' had any special value to you as a furniture company? A. Not at that time.

“Q. It didn't? A. No.

“Q. Why did you continue to use?

“A. Because the sign was there. We had a big electric sign. The sign and all the stationery and

(Testimony of Morris Rudner.)

everything like that, I just continued to keep on using it.

“Q. Have you the same sign there now?

“A. Yes, sir.

“Q. Your counsel has very graciously furnished me a photograph of a sign. We have already had that, but I will show them to you and ask you if that is the electric sign that you had?

“A. Yes, sir.

“Q. Your reason for not wanting to change was simply the cost of changing that name?

“A. That is right, yes.”

Did you so testify?

A. What page are you on now? You are reading kind of fast.

Q. Did you so testify? [118] A. Yes.

Q. That was true, was it not? A. Yes.

The Court: May I ask a question?

The Witness: What page is that?

The Court: Was this sign, the Safeway sign, on the building when you bought it?

The Witness: Yes, sir. The big electric sign was there, and the Safeway sign on the building, also.

The Court: It was there when you bought?

The Witness: Yes, sir.

Mr. Sterry: We have this picture, your Honor, that was attached to the deposition. I want to offer that in evidence as our next exhibit.

The Court: It may be received.

Mr. Magid: No objection.

(Testimony of Morris Rudner.)

The Court: It may be received as Exhibit 6 in evidence.

The Clerk: Exhibit 6.

(The photograph referred to was marked as Plaintiff's Exhibit No. 6 and received in evidence.)

The Court: You have only the one store now, don't you?

The Witness: That's all.

The Court: Just one store. [119]

Q. (By Mr. Sterry): Will you look at the exhibits before you? I think they are the newspaper exhibits. Is it 1, 2 and 3?

The Clerk: That's right.

Q. (By Mr. Sterry): Look at the advertisements there. Those were inserted with your authority, were they not?

A. Some are and some aren't.

Q. Are you——

A. May I answer the question?

Q. Go ahead and give any explanation you want.

A. If I am not there, my manager puts them in.

Q. I don't care whether it is you or your manager.

A. Yes. These are my ads.

Q. I don't mean you personally, but you or your manager authorized those ads?

A. Yes, that is my ad.

Q. You advertised generally. We have quite a number of other similar ads, but I can't see the necessity of adding anything to the record by put-

(Testimony of Morris Rudner.)

ting in six or seven more of the same kind. You paid for all the ads, did you not? A. Yes, sir.

Q. What papers did you advertise in?

A. The green sheet, the Valley paper. I don't know whether it is Valley Sun. It has been quite a while since I advertised in it. The San Fernando paper. At the time of [120] the deposition I was not sure what the papers were, you know, that I advertised in. San Fernando paper.

Q. Mr. Rudner—

A. And I was on TV—excuse me—not TV, radio.

Q. You know that similar advertisements were carried before you bought in as a partner?

A. Oh, yes, sir. The same ads were run before I went in there.

Q. Have you been able to find any that were run like that before you went in?

A. No. I was never asked to. I adopted the idea the way that the store was going and I just kept on going that way.

Mr. Sterry: Now, if your Honor please, that's all. except we have one stipulation.

The Court: Just a minute, Mr. Sterry.

Mr. Sterry: I beg your Honor's pardon.

The Court: Counsel is entitled to cross-examine, if he has anything. Do you want to cross-examine this witness at this time on the matters that have been gone into by Mr. Sterry?

Mr. Magid: Just one question.

(Testimony of Morris Rudner.)

Cross-Examination

By Mr. Magid:

Q. You continued the same type of advertising that Mr. [121] Keefer and Mr. Sims had initiated before you had gone into the business?

A. Yes, sir.

Q. While you were with them, the same type of advertising was continued? A. Yes, sir.

Q. And you continued the same thing after you bought them out? A. Yes, sir.

Q. Now, today, do you have the same type of advertising, these display ads? A. Yes, sir.

Mr. Magid: I have no further questions.

Mr. Sterry: One thing Mr. Whelan calls my attention to. May I see the original deposition? I think there is another exhibit there we want to offer. If your Honor please, I apologize, but I thought this had been admitted in the request for admissions. It is in the deposition.

Redirect Examination

By Mr. Sterry:

Q. I show you the Exhibit A attached to your deposition, a letter and a notice from myself to you. You received that in due course of mail?

Mr. Magid: What is it you are referring to, Mr. [122] Sterry?

Mr. Sterry: The letter you produced that I wrote to him shortly before the suit was brought.

(Testimony of Morris Rudner.)

Mr. Magid: The letter I produced? You asked me to admit, and this letter.

Mr. Sterry: When we took his deposition, he said he didn't get that, but he got one very much like it. That is what misled me. I thought it was in the admissions.

The Witness: I know I got one letter. I don't remember which it was.

The Court: You did get a letter from Mr. Sterry, didn't you?

The Witness: Yes, I did, your Honor.

Mr. Sterry: You will stipulate that is the letter you produced?

Mr. Magid: Yes.

Mr. Sterry: It is stipulated, rather than read his deposition, this is the one he produced.

The Court: All right.

Mr. Sterry: I will ask to have that marked.

The Court: Better have it marked as Plaintiff's Exhibit 7 in evidence.

Mr. Sterry: Plaintiff's Exhibit 7.

The Court: It can be marked without taking it out of the deposition, can't it? [123]

Mr. Sterry: I think it can be.

The Clerk: In evidence, Plaintiff's Exhibit 7.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Sterry): Your statement that the advertisements were put in by either you or the

(Testimony of Morris Rudner.)

manager goes to all the advertisements in the various papers, including those that are included in our request for admissions?

A. I don't understand you.

Q. I say in our request for admissions, we had a number of advertisements, and all the newspaper advertising had either your authorization or that of your manager?

A. Yes, sir.

Mr. Sterry: If your Honor please, I don't know whether it is necessary or not to introduce in evidence a stipulation, but we have here a stipulation as to certain facts.

The Court: I assume that when the parties stipulate, it is then in the record. It is not necessary to introduce it. It is part of the record.

Mr. Sterry: I think your Honor is correct, but there are some decisions that question that.

The Court: All right. If you want to introduce it in the record, I have no objection.

Mr. Sterry: Purely as a matter of precaution, I [124] would offer to introduce in evidence the stipulation of the parties of May 15, 1956.

The Court: It may be admitted in evidence.

Mr. Magid: I will object to that, your Honor, until such time as I am given an executed copy of that stipulation. I signed one and have never had the courtesy of having one given to me, so I don't know whether there is such a stipulation.

The Court: I have a stipulation in the file. It is signed by the parties. It has been approved.

(Testimony of Morris Rudner.)

Mr. Sterry: If your Honor please, if Mr. Magid didn't get a copy——

The Court: That is neither here nor there. I will order the stipulation to be admitted in evidence.

The Clerk: Exhibit 8.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 8.)

Mr. Sterry: I will furnish him one.

The Court: Now, Mr. Sterry, there is one other question. I notice in going through the files there was a request for admissions.

Mr. Sterry: Yes.

The Court: The admissions have never been made, but I understood that the answers had been waived because they were covered by the deposition. [125]

Mr. Sterry: No. If your Honor please, in the deposition Mr. Magid—and I can read that portion—said he would admit certain things, and there is a stipulation as to what is admitted. Where is that stipulation?

The Court: Of course, neither party has followed the rules. The rules evidently are not to be read relative to federal procedure. The rules of our local court say that when you make a request for admissions, they should be answered, and not only that, but the answering party should put down the admission and answer together. From looking at

(Testimony of Morris Rudner.)

this, I can't tell what it is. I don't know what it means.

Mr. Sterry: If your Honor please, I probably should have insisted on Mr. Magid following the rule. I was going to offer in evidence or have Mr. Whelan put in evidence the admissions with this stipulation. Otherwise, I shall have to examine the witness at length on each admission.

The Court: My understanding from what you said yesterday was that the answers had been waived because they had been covered in the deposition.

Mr. Sterry: No, no. Well, if your Honor please, that is probably true. I probably didn't speak with absolute accuracy. Mr. Magid said, "I want to save myself a lot of work. I can tell you which of these I admit and which I deny," and he afterwards reduced that to a stipulation which is filed. If your Honor is not willing to follow that, I will have to [126] take up each one of them.

The Court: I am perfectly satisfied. I thought maybe you should introduce the deposition.

Mr. Sterry: All right. I will introduce the deposition in whole.

Mr. Magid: No objection.

The Court: The deposition may be received in evidence.

The Clerk: Exhibit 9.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 9.)

(Testimony of Morris Rudner.)

Mr. Sterry: Also, I want to introduce our stipulation of March 15th, approved by yourself.

The Court: March 15th? I have one on May 15th.

Mr. Sterry: That's it, May 15th. There are two, I think, on May 15th. I think the other one——

The Court: There was only one dated May 15th. Well, there are two of them.

The Clerk: Which is the one that is first? I want to mark the first one.

The Court: This is 8.

The Clerk: And the other one will be No. 10.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 10.)

Mr. Sterry: I will ask Mr. Whelan to read to your Honor the admissions that are requested and admitted. He can pass any ones that have been denied. We have those marked. If we read that into the record, it would make it clearer and probably be of a little more assistance to your Honor.

The Court: All right.

Mr. Whelan: Request No. 1, which is admitted by the stipulation:

“Plaintiff was, as of the date of the filing of the complaint herein and is now, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and was as of that date and is now a citizen of the State of Maryland.”

(Testimony of Morris Rudner.)

Did your Honor want all of that read?

The Court: No. Just read the admission and state after denied or admitted.

Mr. Sterry: Certain of them he has partially admitted and partially denied. He can indicate that.

Mr. Whelan: Request No. 2, I will read in its entirety. Part of that is admitted and part denied:

“Defendant Safeway Furniture Co., Inc., was as of the date of the filing of the complaint herein and is now a corporation duly organized and existing under and by virtue of the laws of the State of California, and was as of that date and is now a citizen of the State of California.”

That it is now a corporation and is now a [128] citizen is denied. Otherwise, it was admitted, but that becomes irrelevant in view of the dismissal of the corporation from the suit.

Mr. Magid: If your Honor please, for the sake of brevity, since your Honor has indicated we must finish today, inasmuch as the deposition in whole is now part of the record, all that Mr. Whelan is about to read is in the deposition.

Mr. Whelan: The only point in reading, your Honor, I think, was to give you a full view of just what had been admitted at this time.

The Court: I have already gone over your admissions and I have already gone over the stipulations, so I know what you have admitted and what you have denied. If you are trying to educate me, you are wasting your time. If you are trying to make a record, that is all right.

(Testimony of Morris Rudner.)

Mr. Sterry: Your Honor please, I think the record is perfectly clear in the deposition and the stipulations and the admissions are there. I was under the impression from your Honor's remark the other day—it is my error—you were uncertain as to what had been admitted. If you are certain as to that, I agree it is a perfect waste of time.

The Court: I was just calling your attention to the fact that neither counsel in this case has followed the rule, that's all.

Mr. Sterry: If your Honor please, I don't [129] think that we didn't follow the rule. We contended that Mr. Magid was relieved from that.

We rest, if your Honor please.

The Court: I notice it is nearly 12:00 o'clock.

Mr. Sterry: If your Honor please, Mr. Whelan calls to my attention that we had information, and I don't want to state it, but we had information that there are probably some advertisements at an earlier date than have been indicated under the name Safeway, and we are having that looked up. If we find that is true, we would want to introduce those papers.

The Court: All right. If you find them, you can put them in the record. It is nearly 12:00 o'clock. We will recess now until 2:00 o'clock this afternoon.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [130]

Friday, May 25, 1956—2:00 P.M.

Mr. Sterry: If your Honor please, we have the early ads. It will take about two minutes.

The Court: If you have got them, put them in.

Mr. Sterry: If your Honor please, we found out about these late last night or early this morning. The witness has the official volume of the Herald-Express and a photostatic copy of the Times and has promised to return them to them. I don't really care which one we use. They are both exactly the same.

The Court: I am interested in the date as much as anything else.

Mr. Sterry: The date is the same.

The Court: The date is the same. All right.

Mr. Magid: You will let me look at them, first, won't you, counsel?

The Court: Yes. Show them to the defendant.

Mr. Sterry: I beg your pardon. If you will step over here, I will show them to you.

HENRY J. LUDKE

called as a witness herein by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as [131] follows:

Redirect Examination
(Continued)

By Mr. Sterry:

Q. Mr. Ludke, you have in front of you a large bound book. Did you get that from the—well, what is it?

A. I got that volume from the Herald, Los Angeles Herald. It was the Los Angeles Herald at that time.

Q. On the page you are showing is an advertisement of Safeway Stores on March 17, 1925. I show you a photostat of the one appearing in the Los Angeles Times of the same date.

A. Same date, yes.

Q. Did you compare that with the one in the Times?

A. Yes. I saw the original at the Times office.

Mr. Sterry: If your Honor please, we have promised to return this. I will offer this one in evidence for the time.

The Court: The photostat?

Mr. Sterry: Yes.

The Court: It may be received in evidence.

The Clerk: Exhibit 11.

(The document referred to was received in evidence and was marked as Plaintiff's Exhibit No. 11.)

(Testimony of Henry J. Ludke.)

Mr. Sterry: I think the record is clear, if counsel will stipulate, that substantially, so far as the wording is [132] concerned, it is the same.

The Court: What difference does it make whether it is in one or a dozen newspapers? The thing I am interested in is the date.

Have you any questions of this witness?

Mr. Magid: No questions.

The Court: You may step down. You may return the volume to the Herald-Express.

(Witness excused.)

Mr. Sterry: We rest.

The Court: You may proceed.

Mr. Magid: For the defendant, Morris Rudner, I move for nonsuit on the ground the plaintiff has failed to prove a prima facie case.

The Court: Well, we don't have any motion for nonsuit in federal court. However, I will consider your motion as a motion to dismiss. It is denied.

Call your first witness.

Mr. Magid: Mr. Rudner, will you take the stand, please? You have already been sworn.

MORRIS RUDNER

recalled as a witness herein in his own behalf, having been previously duly sworn, was examined and testified as follows: [133]

Direct Examination

By Mr. Magid:

Q. Mr. Rudner, have you ever had any people come into your store and inquire as to whether you were a subsidiary or connected in any way with the Safeway Stores, the plaintiff in this action?

A. No, sir.

The Court: Will you speak up so that counsel can hear you?

The Witness: No, sir.

Q. (By Mr. Magid): Do you sell any items, such as mops, waxes, brooms, or other household accessories, other than furniture? A. No, sir.

Q. In one of the advertisements in either Plaintiff's Exhibits 1, 2 or 3, there is a step stool shown as part of a kitchen set. Do you now sell any such item? A. No, sir.

Q. Have you discontinued the sale of breakfast sets as such, with the step stool and the other accessories shown in that advertisement?

A. Yes, sir.

Q. Have you ever sold any outdoor furniture?

A. No, sir.

Q. Have you ever sold any TV trays? [134]

A. No, sir.

Q. Clothes baskets? A. No, sir.

Q. Wood card tables? A. No, sir.

(Testimony of Morris Rudner.)

Q. Outdoor chairs? A. No, sir.

Q. Rockers?

A. Only big living room rockers that go with the living room suites.

Q. Yacht chairs? A. No, sir.

Q. TV hassocks? A. No, sir.

Q. Metal lawn tables? A. No, sir.

Q. Two-tier hostess carts? A. No, sir.

Q. Ironing boards? A. No, sir.

Q. Folding trays? A. No, sir.

Q. Wrought iron furniture?

A. Living room suites and dinette sets.

Q. Did you ever sell any waste baskets? [135]

A. No, sir.

Q. Magazine racks? A. No, sir.

Q. Corner shelves? A. No, sir.

Q. Round wall shelves? A. No, sir.

Q. Ash trays? A. No, sir.

Q. TV tables?

A. Only with table model TVs.

Q. Aluminum chairs? A. No, sir.

Q. Do you intend to sell any of those items other than the ones you have answered yes to?

A. No, sir.

Q. Has anybody ever come in and asked you for any of those items, so far as you know?

A. Not that I can remember.

Q. Have you ever told any customers or potential customers that you were connected with Safeway Stores, Incorporated, the plaintiff in this case?

A. No, sir.

(Testimony of Morris Rudner.)

Q. Has anybody ever come into your store and asked you if you were affiliated with the plaintiff, connected with the [136] plaintiff, Safeway Stores?

A. No, sir.

Q. Did anybody ever ask you if the plaintiff was sponsoring the use of that name in your store?

A. No, sir.

The Court: Did anybody come in and ask you where your grocery department was?

The Witness: No, sir. I have furniture all over the place and signs all over the inside.

Q. (By Mr. Magid): Have you used the name Safeway Furniture for the sole purpose of trading upon the good will of the plaintiff in this case?

Mr. Sterry: I object to that on the ground it is leading the witness.

The Court: Isn't that your charge?

Mr. Sterry: That is the charge.

The Court: Doesn't he have a right to deny it? Objection overruled. You may answer.

Q. (By Mr. Magid): Have you ever used the name Safeway Furniture Store or Safeway Furniture Company for the sole purpose of trading upon the good will of the plaintiff, Safeway Stores?

A. No, sir.

Q. Has anybody ever told you that because of the way you conduct your business or because of the services you have [137] rendered, that they believe that the plaintiff's business conduct and services has fallen into disrepute?

(Testimony of Morris Rudner.)

Mr. Sterry: Now, one moment.

The Court: Objection sustained.

Mr. Sterry: That is objected to.

Mr. Magid: I am assuming, your Honor, we need not go into the conduct in the Reseda store, that being a corporation.

The Court: That's right. You don't have anything to say about that.

Mr. Sterry: I think regardless of whether that was good or bad, that is now moot. It has gone out of business.

Q. (By Mr. Magid): Mr. Rudner, I show you what appears to be something torn out of a newspaper, and ask you if you can identify that for me.

A. Yes, sir.

Q. Where did you get that scrap of paper from?

A. Out of the Examiner of May 20th.

The Court: Of what year?

The Witness: 1956.

Q. (By Mr. Magid): Can you tell me whether you have any connection, directly or indirectly, or whether anybody connected with you or your family, as a servant, agent, or employee, has any connection whatsoever with the Safeway that is mentioned in that advertisement?

A. No, sir. [138]

Mr. Magid: I offer this as defendant's exhibit, your Honor.

The Court: It may be received in evidence as Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A.

(Testimony of Morris Rudner.)

(The advertisement referred to was received in evidence and marked as Defendant's Exhibit A.)

Q. (By Mr. Magid): Mr. Rudner, with the exception of two instances, since the filing of this action have you caused to be inserted in any newspapers any of the display advertisements of this type? This is a display advertisement, is it not?

A. Yes.

Q. Have you caused to be inserted any such advertisements?

A. Would you restate that, sir?

The Court: Read the question.

(Question read.)

The Witness: Since when?

Q. (By Mr. Magid): Since the filing of this suit.

The Court: What difference does it make as to what happened since the filing of the suit? It doesn't make any difference as far as I know whether he has or hasn't.

Mr. Magid: I want to check the dates. [139]

Q. What type advertising do you do now?

Mr. Sterry: That is objected to as incompetent, irrelevant and immaterial.

The Court: I think it is immaterial as to what kind of advertising he does. Sustained.

Mr. Magid: The plaintiff is asking for a permanent injunction.

(Testimony of Morris Rudner.)

The Court: For the use of the word Safeway.

Mr. Magid: No, and in the alternative, page 14, line 32, he is asking for an alternate injunction against using any name Safeway in such a way or manner as to imitate the word Safeway.

The Court: It has nothing to do with the case. I am not going to tell you how he can dictate to the newspaper what type they are going to use, whether dark space, light space, or not.

Mr. Magid: That is what the plaintiff is asking for.

The Court: I can't do that.

Mr. Magid: In that case, your Honor, we have no further questions.

Mr. Sterry: May I ask just one or two questions?

The Court: Yes.

Mr. Sterry: They are probably not cross-examination. They are matters I should have interrogated the witness about [140] before.

Cross-Examination

By Mr. Sterry:

Q. The first one will be the advertisement of the Safeway Furniture on Broadway. That company, you know, has gone out of business, don't you?

A. It has been sold to Friendly Furniture and they are operating Safeway right next door.

Q. But they are under another corporate name?

A. No. Safeway Furniture Company is what they are still under.

whether they are in the furniture business or they are in the repair business or they are in the delivery business. It doesn't make any difference, unless there has to be competition, and this case, the Phillips case, indicates that there doesn't have to be competition.

Mr. Sterry: The what case? [143]

The Court: The Phillips case indicates that there doesn't have to be competition.

Mr. Sterry: If your Honor please, it is very embarrassing to an attorney to try to ask to argue something the court says he is not interested in, but if you can give me about 30 minutes to point out other issues which I think your Honor has overlooked entirely and which have been sustained by the Ninth Circuit——

The Court: Go ahead. I will give you until 4:00 o'clock.

Mr. Sterry: Well, I will be very brief, and if your Honor wants briefs filed, we shall be very glad to do so.

The Court: It doesn't make any difference to me, because I look up my own law, but if you have any cases you want me to examine that you think I might overlook, I will be glad to examine them. But I am not requiring you to file a brief. I am giving you the opportunity to file one.

Mr. Sterry: I will be very glad to. But, if your Honor please, I would like to discuss with you now the matter orally, so if I don't make myself clear your Honor can put any questions you want.

The Court: Go ahead.

(Argument of counsel.)

Mr. Magid: The defendant asks leave to reopen the case for the purpose of offering in evidence the stipulation [144] and order. Do you have the date?

The Court: It was filed May 21.

Mr. Magid: Filed May 21, which refers to the listings——

Mr. Sterry: The time of the signature is May 17th.

The Clerk: This one is May 16th, signed by you.

Mr. Magid: Dated May 16, 1956, and filed with this court May 21, 1956.

The Court: Let the record show that the motion is objected to by the plaintiff.

Mr. Sterry: It is objected to on two grounds. It is a statement that there have been that many number of fictitious names filed, and that doesn't show they have ever been used. Secondly, it is immaterial whether other persons have used it or not. If your Honor wants to overrule the objection, then the stipulation is in evidence.

The Court: The objection is overruled. The case will be reopened.

Mr. Magid: Thank you.

The Court: The affidavit will be admitted in evidence.

The Clerk: Exhibit B.

(The document referred to was received in evidence and marked as Defendant's Exhibit B.)

(Further argument by counsel.) [145]

The Court: The court will now stand in recess.

(Whereupon, at 4:00 o'clock p.m., Friday, May 25, 1956, an adjournment was taken.) [146]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 27th day of July, 1956.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed August 16, 1956. [147]

PLAINTIFF'S EXHIBIT No. 9

In the United States District Court, Southern
District of California, Central Division

No. 17553—HW

SAFEWAY STORES, INC.,

Plaintiff,

vs.

SAFEWAY FURNITURE COMPANY, INC., a
Corporation, et al.,

Defendants.

Deposition of Morris Rudner, taken by the plaintiff on Thursday, March 22, 1956, commencing at 2:00 p.m., at the offices of Gibson, Dunn & Crutcher, 634 South Spring Street, Los Angeles, California, pursuant to notice on file, before Horce E. Snyders, a Notary Public in and for the State of California.

Appearances:

For the Plaintiff:

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY, ESQ.,
HENRY F. PRINCE, ESQ.,
FREDERIC H. STURDY, ESQ.,
IRA C. POWERS, ESQ.,
JAMES R. HUTTER, ESQ., by
NORMAN S. STERRY, ESQ.,
MARTIN E. WHELAN, JR., ESQ.,

For the Defendants:

WILLIAM B. MAGID, ESQ.

Plaintiff's Exhibit No. 9—(Continued)

MORRIS RUDNER

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sterry:

Q. Mr. Rudner, you are one of the defendants in this case? A. I am the defendant.

Q. Well——

A. I guess that's what you want.

Q. You say "the." There are three of them named, but you are a defendant? A. Yes.

Q. Where do you live, Mr. Rudner?

A. 19400 Collier, Tarzana.

Mr. Sterry: Would you read that answer, please?

(Record read.)

Q. (By Mr. Sterry): Where is Tarzana?

A. Right outside of Van Nuys.

Q. Oh, yes.

A. About eight or nine miles.

Q. That's a new one on me. I never heard of it.

A. Well, there is Encino and then Tarzana.

Q. Have you ever given a deposition before, Mr. Rudner? [2*] A. No, sir.

Q. Well, then, I think it is proper to explain to you under the Federal Rules and also under our State procedure any party has a right of taking

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

deposition of the opposite party for purposes of discovery. You are testifying under oath the same as though you were in court. Mr. Snyders takes down here on his machine any questions which I ask and any answers that you give. After that he transcribes it. Then you will have a chance to read it and make any corrections that are necessary to make it speak the truth, but if you correct it your opponent at the time of trial has the right to call your attention to the corrections and to make any comments on them that he thinks fit or proper either before the judge or the jury—in this case it isn't the jury—so it is rather important for you to understand the questions before you answer them. If some questions are asked that you don't understand, say so and I will explain it. If I don't, why, your counsel will explain it. A. All right.

Q. All we want are the facts about which you are interrogated. If at any time I should drop my voice so you don't hear, or if I speak rapidly, don't hesitate to say so. A. O.K., sir.

Q. With that explanation, let me ask you what is [3] your age?

A. I have to laugh because my wife and I are always kidding, but I'll be fifty-four September the 28th.

Q. You have read the complaint in this suit, and the answer?

A. My attorney read it for me. I have complete confidence in him. I have read it, too, yes.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Q. All right. Then you know in general what it is about? A. Yes, sir.

Q. You know that generally the plaintiff, which I will refer to as Safeway Stores to save confusion, is challenging your right to use the name "Safeway Furniture Company." That is the issue in this case. Now, Mr. Rudner, please don't nod because the reporter can't take a crick of the neck.

A. All right. This is the first time so you will have to forgive me for that.

Q. Let me tell you that is a very, very common habit of all witnesses, either in depositions or in court. Sometimes I have heard reporters say they get the crick of the neck but he isn't supposed to do it. A. O.K., sir.

Q. So, Mr. Rudner, the store you are operating now is situated where?

A. 6416 Van Nuys Boulevard, in Van Nuys. [4]

Q. When did you start operating it?

A. Do you have the dates down there? You looked them all up.

Mr. Magid: Yes.

The Witness: I bought it from a concern that had it.

Mr. Magid: Just a minute. Let me get it for you. This is off the record.

(Discussion outside the record.)

The Witness: April 3rd, 1952.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. (By Mr. Sterry): I thought you started to say that you bought it from someone.

A. Well, there were partners in there at the time and I bought in with them and formed a limited partnership.

Q. Let me ask you a few questions. You say you bought in with them. "Them" of course could mean anybody. Whom do you mean?

A. Frank Kiefer and Sam Simms, who owned the store.

Q. How long had that store been operating, do you know?

A. Before that?

Q. Yes. Just approximately?

A. It might be a year, it might be longer. I don't know.

Q. Or it might be a little less?

A. Yes. I'd say it's about two years. We looked up the dates. June 22, 1950. [5]

Q. That is from information your counsel is showing you?

A. Yes, sir.

Q. That isn't of your own knowledge but that is your approximate idea?

A. Yes.

Q. It was being operated under what name?

A. Safeway Furniture Company.

Q. Before that had you been in business at all?

A. No, sir.

Q. What was your occupation?

A. I worked for furniture stores.

Q. In what capacity?

A. Salesman.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Q. What was the name of these people who were operating the store?

A. Frank Kiefer and Sam Simms.

Q. Frank Kiefer and Sam Simms?

A. That is right.

Q. You say you bought in with them. Was it an equal partnership when you bought in, or did you buy the controlling interest, or what?

A. They were the limited partners and I was a general.

Q. That was on what date?

A. April 3rd, 1952 [6]

Q. Before that you had not been in the mercantile business at all? A. Not for myself, no.

Q. You say not for yourself. You mean you hadn't been——

A. In any kind of business myself.

Q. You had simply been working as a salesman?

A. I had been a salesman all my life.

Q. Now, you bought in with them and at the time you bought you formed a limited partnership, did you? A. Yes, sir.

Q. Have you the partnership articles with you?

A. No, sir.

Mr. Sterry: Can you furnish them, Mr. Magid?

Mr. Magid: We don't have them. I imagine they must be with the attorneys who formed that partnership.

Mr. Sterry: Who?

Mr. Magid: I was not the attorney.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

The Witness: I guess we could get them.

Mr. Magid: Was Frank Kiefer's cousin an attorney?

The Witness: Yes.

Mr. Magid: He would have them.

Mr. Sterry: I don't want to go to any more trouble or expense for either of us than necessary. I don't want to ask him secondary evidence unless it is necessary. I would like to know what the articles required and I don't like to [7] ask a businessman that if we can get the articles.

Mr. Magid: I imagine they must be filed with the County Clerk because they did have an attorney.

Mr. Sterry: Your idea that they must have been filed may be correct and it may not, because you and I know that a lot of people don't do things they should do.

Mr. Magid: The certificate is filed.

Mr. Sterry: I know, but the certificate won't show the partnership articles.

Mr. Magid: No, as I say, the certificate is filed so I imagine the articles are filed. At any rate, we don't have a copy of the articles.

Q. (By Mr. Sterry): Didn't you have the articles when you bought in as a general partner?

A. What?

Mr. Magid: The contract you made with Frank and Sam.

The Witness: Yes. My accountant has that.

If I may say something here, I have an account-

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

ant that has been with me ever since I have been open, and he takes care of all my books just like Mr. Magid takes care of all my attorney work.

Q. (By Mr. Sterry): If he has it you ought to be able to furnish us a copy of it.

A. I would be happy to.

Q. You say you were the general partner and these two gentlemen were limited partners. Of course, we know [8] that limited partners have limited liabilities. I don't want to examine you really about what they are called because my experience has been that laymen very often misstate the facts.

A. Yes.

Mr. Sterry: I would like to have this understanding, Mr. Magid, that they will furnish us a copy of it and then I can advise you whether I want to examine him on it or not.

Mr. Magid: I will put it this way, Mr. Sterry: If Mr. Rudner's accountant has a copy of the articles we will be very happy to furnish you with a copy. Otherwise I wouldn't know whether they are because I have never seen them. I think we should bring out the fact that at the time you bought into this partnership or into this business they had been doing business under the same name at the same address. Is that correct?

The Witness: Yes.

Q. (By Mr. Sterry): Since about when?

A. 1950.

Mr. Magid: Let me see what the answer says

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

here. All we know is that on June 22, 1950, they filed a certificate of doing business under the name of Safeway Furniture Company.

Q. (By Mr. Sterry): You don't know whether they operated under that name? [9] A. No.

Q. Where are they located now?

A. Well, the one man sold the Safeway Furniture Company in Los Angeles, sold it to a fellow who was about to lose it, and I had a lot of trouble with their bills coming to my place. Anyway, that is neither here nor there.

Q. That is not concerned with this.

A. No.

Mr. Magid: This is off the record.

(Discussion outside the record.)

Q. (By Mr. Sterry): All I am asking is where those two people are so if we can't get the information from Mr. Rudner we can take their depositions. That's all I want.

A. Frank is up in San Jose. I don't know what his address is.

Q. Frank who? A. Frank Kiefer.

Mr. Magid: Is he in business there?

The Witness: Yes.

Mr. Magid: Do you know the name of the store?

The Witness: No.

Q. (By Mr. Sterry): Who was the other man?

A. Sam Simms, and he has the Savon Furniture Company on Van Nuys Boulevard in Van Nuys.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. All you know about the man you call Frank is that he is in San Jose? [10]

A. He is in San Jose in the furniture business.

Q. All right. Now, when you bought in there in 1952 you took charge of the business?

A. Oh, yes.

Q. Mr. Simms and—who was the other gentleman? A. Mr. Kiefer.

Q. —and Mr. Kiefer had nothing actually to do with the management? A. That is right.

Q. What I mean is I don't want to examine you as to what your agreements contained for the very reason I stated, that I have known very many honest businessmen who will misstate the effect of a legal document. Therefore I would like to get it. If I can't get it I may have to ask you for it.

Mr. Magid: What is his phone number?

The Witness: Whose?

Mr. Magid: Your accountant's.

The Witness: WEbster 1-1709.

Mr. Magid: Let me call the accountant and see if I can get it.

Mr. Sterry: All right.

(Short recess.)

Mr. Magid: He is out and they don't expect him in for an hour or two.

Mr. Sterry: The thing is I don't think we will get it [11] now. I will try and conclude and then see if we can get it. If you will send me a copy of it—

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Mr. Magid: If he has it we will get it for you.

Mr. Sterry: ——I will read it over and I probably won't want to ask him anything about it, but I will reserve the right to.

Mr. Magid: O.K.

Q. (By Mr. Sterry): Mr. Rudner, before going on with this store in Van Nuys, your present store, didn't you buy out another store in Reseda?

A. Let me hear the question again.

Q. The question is didn't you buy a furniture store in Reseda known as the Reseda Furniture Company?

Mr. Magid: Before you bought Van Nuys?

The Witness: No, I bought in Van Nuys first.

Q. (By Mr. Sterry): Then you did buy a Reseda Furniture Company? A. Afterwards.

Q. Did you put that in a corporation?

A. Yes.

Q. How long did that run?

A. About seven or eight months. I tried to put my son in it but he wouldn't take care of it.

Q. You operated that under the name also of the Safeway Furniture Company?

A. Safeway Furniture Corporation. [12]

Q. Corporation? A. Yes.

Q. Now, we have made that a party defendant and the answer alleges that it has gone out of business. A. Yes.

Q. Who were the officers of that corporation?

A. My wife, my son and I.

Q. That hasn't been operating? A. No.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. As I understand it, the store ran for a few months and then ceased operations. Is that right?

A. Yes.

Q. What became of its stock of goods and furniture and fixtures and so forth?

A. I sold it to these people. They have since gone out of business. I seen an ad in the paper not long ago that they were liquidating. Incidentally, they named it the Reseda Furniture Mart. It used to be the Reseda Furniture Company when I bought it.

Q. What happened to the Safeway Furniture Corporation? A. That is out.

Q. Well, I know it is out. You allege it doesn't intend to go back in business. Is the franchise still in effect, do you know? A. No, sir. [13]

Q. It isn't? A. No, sir, that is deceased.

Q. All right. Then I will confine my questioning to the Van Nuys store. A. All right.

Q. I might ask do you know whether your corporation has been dissolved or whether it has paid its franchise tax or otherwise?

A. No, I haven't paid any franchise in the last couple of years.

Q. All right. Let's continue with your store on Van Nuys Avenue, isn't it?

A. Van Nuys Boulevard.

Q. Where is that with reference to the center of town in Van Nuys?

A. It is right in the center of town.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Q. Generally what line of furniture do you carry?

A. Living room, bedroom, kitchen, that is, dinette sets, stoves and refrigerators, springs and mattresses.

Q. Carpets? A. Rugs, oh, yes.

Q. You carry, do you, miscellaneous household articles such as brooms? A. No.

Q. Don't you?

A. No, we carry no brooms, no dishes. We [14] don't carry things like that. No mops, no brooms, or anything.

Q. Do you carry any patio furniture?

A. No, sir.

Q. At the time you bought into this limited partnership where were you living?

A. Where was I living when I first bought in?

Q. Yes. A. I don't know the number.

Mr. Magid: What town?

The Witness: In Los Angeles. It's on Almayo Avenue, West Los Angeles.

Q. (By Mr. Sterry): How long had you lived in Los Angeles or its vicinity prior to the time you purchased in this limited partnership?

A. About six years.

Q. Where did you live before that?

A. Ohio.

Q. Ohio? A. Yes.

Q. During this six years that had been here you knew, of course, of Safeway Stores, Incorporated.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

didn't you? A. Incorporated?

Q. Well——

A. I never knew of it. I knew Safeway Stores were big. I never knew they were incorporated. [15]

Q. No, they don't use that, but the name of the plaintiff is Safeway Stores, Incorporated.

A. I never heard anything about it until my attorney come up with it.

Q. You never heard anything except "Safeway"? A. That's all I ever heard.

Q. You knew there was a large chain of grocery stores or food markets operating under the name of Safeway? A. Yes.

Q. You knew generally their form of advertising, didn't you? That is, you had seen many of their advertisements in the papers and in the stores?

A. I've seen a lot of advertisements, you know what I mean, but I never noticed.

Q. Did you ever patronize any of the stores?

A. I sure did. I still do.

Q. And you had seen over every store the name "Safeway"? A. Yes, sir.

Q. As you say, you never heard of the word "Company," the word "Incorporated," or anything else; you just saw the word "Safeway"?

A. That's all. I never even looked for bargains. I'd just go in and buy.

Q. You knew generally that they had been operating throughout California and a large part of the United States. [16] didn't you? A. Yes.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. After you undertook this limited partnership how long was it before these other two gentlemen who were the limited partners retired?

A. Well, I would have to say between eight months and a year.

Q. Between eight months and a year after?

A. Yes, sir, I would say about that long.

Q. It might be a month or two longer, or a month or two shorter, but as near as you can fix it it was between eight months and a year?

A. Yes.

Q. Did they do it voluntarily through an arrangement of paying them whatever their investment was?

A. That is right.

Q. Since then you have been operating it as your own business?

A. That is right.

Q. How about your son; has he any interest in the business with you?

A. No, sir. May I explain?

Mr. Magid: No, that's all.

The Witness: All right.

Mr. Sterry: Let him explain. I'd like to get the story. [17]

Mr. Magid: Just answer the question.

The Witness: All right.

Q. (By Mr. Sterry): Go ahead.

A. I'll tell you how he came in and how he got out.

Q. All right.

A. He got married and I thought he would set-

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

tle down if I would give him a little partnership. It didn't last very long, so when they split up and got divorced it was over. That's what a father tries to do.

Q. I don't want to pry into your personal life or that of your son, but he was your partner for a short period of time? A. That is right.

Q. About when? I don't care exactly, but approximately?

A. I don't know the dates. He was only partners with me five or six months, I guess. I took him in about June, '53, and his divorce just became final, didn't it?

Mr. Magid: About a year.

The Witness: Yes, just about a year ago he went out.

Q. (By Mr. Sterry): He was a partner with you, then, for about a year?

A. About a year.

Q. How about your wife; has she any interest in it except any community interest?

A. No. [18]

Q. During all the time since you bought into this limited partnership or formed this limited partnership, up to the present time, you have actually managed and run the business?

A. That is right.

Q. Have you had charge of the advertising?

A. Yes, sir.

Q. In what papers have you advertised?

Plaintiff's Exhibit No. 9—(Continued)

Deposition of Morris Rudner.)

A. The green sheet—that is the Van Nuys News, and the Reseda Sun. That is the West Valley paper.

Mr. Sterry: So as not to have the record too long, would you read me that last answer so I can follow it?

(Record read.)

Q. (By Mr. Sterry): You speak of the Van Nuys News as the green sheet?

A. That is a nickname for it.

Q. That is what they call it? A. Yes.

Q. Those are the only two papers you have advertised in?

A. Yes, that and the West Valley paper.

Q. Have you done any radio advertising?

A. About one month, that's all.

Q. When was that?

A. Oh, a couple of years ago.

Q. What station was that that you advertised on? [19]

A. I think it is KGIL. I am not sure.

Q. Can't you look it up and be sure about it?

A. I can find out in a minute.

Mr. Magid: How?

The Witness: Call Marty. No, he's not in. I think it is KGIL.

Q. (By Mr. Sterry): KGIL?

A. That is right.

Q. When you read this over—I am not going to continue the deposition for this, but when you read

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

it over please look it up and be sure, and if it isn't correct I will not make any charge against you for being incorrect here, but just give us the correct name. A. All right.

Q. And the dates. A. All right.

Q. Did you write out the ads that were to be used over the radio?

A. No, the gentleman that came down to make up the radio ads made them out.

Q. After talking to you? A. Yes.

Q. In all of your radio ads the name "Safeway" was the one that was used, wasn't it?

A. Safeway Furniture Company.

Q. Are you quite certain of that? [20]

A. Yes, sir.

Q. You have seen all the advertisements they have printed in this green sheet, haven't you?

They printed none that——

Mr. Whelan: Answer audibly, Mr. Rudner.

The Witness: Yes. I am sorry.

Q. (By Mr. Sterry): They haven't published any advertisements that you haven't written or authorized, have they?

A. Well, I don't see them all because when I am not there the salesman takes care of some of that stuff, you see.

Q. All right. You have a salesman, then, who has authority when you are not there to approve advertising?

A. Well, yes, to a certain extent.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. Mr. Rudner, to rather short-circuit it, we served under the Rules of Federal Procedure a request for admission of facts on your counsel, and in them we asked with reference to advertisements. Have you seen those? A. Yes.

Q. Are there any of the advertisements set out there that you didn't authorize?

A. I don't remember any of them that I didn't authorize.

Q. Are there any of them in our request for admission that you didn't see when it came out in the paper? [21]

A. A lot of them, because I never checked the papers. I know when the bill comes I pay it. You know, I run them classified all the time.

Q. I show you my office copy of the request for admission, Exhibit M, and ask you if that was an advertisement run in what you call the green sheet?

A. It may or may not be. I don't remember, sir.

Q. You wouldn't say you didn't authorize that, would you? A. No. I don't remember.

Q. Well, you have been billed for these advertisements in the green sheet, haven't you?

A. Yes, sir.

Q. And you paid them? A. Yes, sir.

Q. You know of no advertisements that they have run that they haven't billed you for?

A. Not that I know of, sir.

Q. All right. At the time you bought into this store and after you continued to run it you knew, I

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

believe you stated, of the very large operations of the plaintiff's food markets under the name of Safeway?

A. Yes, sir.

Q. You knew they had built up a very great reputation under that name, didn't you?

A. Yes, sir. [22]

Q. You say you were a patron of the Safeway Stores?

A. Yes, sir; still am.

Q. You say you knew they had built up a reputation. You knew that it was a very favorable one, didn't you?

A. I buy or my wife buys all her meats there. It's the best meat you can buy.

Q. Well, I know.

A. Well, do you want an honest answer?

Q. Yes. A. Excuse me.

Q. Regardless of what you say, you knew that the reputation of Safeway Stores, the food market, was a very favorable one, didn't you?

A. Yes, sir.

Q. Mr. Rudner, I show you Exhibit P to our request for admission, a copy of a letter which I dictated to you, and I will ask you if you ever received that letter.

A. No, I never got this letter here.

Mr. Magid: You never got this letter?

The Witness: I never got that letter.

Q. (By Mr. Sterry): Did you get any from this firm?

A. Yes, sir, on April 2nd, 1954.

Q. This is dated October 20, 1953. A. Yes.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. May I see the copy of the letter you have?
Just show it to me. I wouldn't ask you to take it
out. [23]

(The document referred to was passed to Mr.
Sterry.)

Q. (By Mr. Sterry): Your counsel shows me a
letter of April 2nd, 1954, addressed to the Safeway
Furniture Company, 6416 Van Nuys Boulevard,
signed in type by Gibson, Dunn & Crutcher, by my-
self, Norman S. Sterry. You received that in the
due course of mail? A. Yes, sir.

Q. You have no receiving stamp—oh, yes, you've
got it marked on here "Received April 6."

A. That's when Mr. Magid received it.

Q. Oh, you got it and sent it to him?

A. Yes, sir.

Q. You didn't make any reply to that letter, did
you? A. No, sir.

Mr. Sterry: Now, Mr. Magid, if you would be
good enough to take that off I would like to have a
photostatic copy made of it.

Mr. Whelan: Mr. Sterry, we do have a copy. It
was stuck to the back of the other one.

Mr. Sterry: We have a copy of this in my file so
that's all right. What I would like to do would be
to take just a minute to have a photostat made. We
have a photostating machine here, and if you have
no objection, if you can take that off I'll have Marty

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

take it down and have it photostated and return the original to you. I have only [24] a few more questions, if you will wait until Marty comes back.

Mr. Magid: Sure.

(Discussion outside the record.)

Mr. Sterry: I will offer that letter now that you have given us as Exhibit A.

Mr. Magid: No objection.

Mr. Sterry: The Notary can photostat the copy. I don't suppose you would care for a photostat for your files as long as you have the original.

Mr. Magid: No.

Mr. Sterry: And I don't think we need it for our copy.

(The document referred to was thereupon marked Plaintiff's Exhibit A for Identification.)

Q. (By Mr. Sterry): The complaint was filed December 1, 1954. Did you think, Mr. Rudner, the name "Safeway" had any special value to you as a furniture company?

A. Yes. I bought the name when I bought the store so I continued to use it. Is that the answer you wanted, sir?

Q. No, Mr. Rudner, I don't want any answer except a truthful one, and I am not intimating that you weren't truthful. But that isn't an answer to my question. A. All right, sir.

Plaintiff's Exhibit No. 9—(Continued)

Deposition of Morris Rudner.)

Q. You allege in your answer that you bought the name and that is a question of law which I am not going to [25] argue with you. Personally, as I understand the situation, there was a partnership running this store out there under that name.

A. That is right.

Q. You bought an interest in it?

A. That is right.

Q. And then the other partners retired?

A. That is right.

Q. All right. Now, what I am asking is not as to your legal right to use that name. That's what this lawsuit is about and Mr. Magid and I probably won't agree. That's why we are having a suit. I am asking you if you thought that "Safeway" had any special value to you as a furniture company?

A. Not at that time.

Q. It didn't? A. No.

Q. Why did you continue to use it?

A. Because the sign was there. We had a big electric sign. The sign and all the stationery and everything like that, I just continued to keep on using it.

Q. Have you the same sign there now?

A. Yes, sir.

Q. Your counsel has very graciously furnished me a photograph of a sign. We have already had that but I will show that to you and ask you if that is the electric [26] sign that you had.

A. Yes, sir.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Q. Your reason for not wanting to change was simply the cost of changing that name?

A. That is right, yes.

Q. How about the present time?

A. Well, I built up good will. I have built up a business there.

Q. Is there any special value to you in the name "Safeway"?

A. Safeway Furniture Company.

Q. Well, do you think the Safeway Furniture Company brings you more business than if you used the Van Nuys Furniture Company?

A. I think so.

Q. Why?

A. Because I built up a good reputation there.

Q. Aside from that, if you used the word "Van Nuys Furniture Company," or any other name couldn't you build up the same reputation?

A. Not all over again.

Q. You couldn't?

A. I would have to start all over again.

Q. When you said in a previous answer that it had no value then, at what time were you referring?

A. When I bought it. [27]

Q. How about the time when you got this letter on April 2nd, 1954?

A. Well, it had some value to it.

Q. How much? A. I wouldn't know.

Q. You think, however, the principal value has been built up since then?

Plaintiff's Exhibit No. 9—(Continued)

Deposition of Morris Rudner.)

A. Since I bought it?

Q. Since my letter to you of April 2nd, 1954.
Now please don't ask your counsel.

A. I am a little mixed up on the question here,
r.

Q. All right. You said a little while ago that the
word "Safeway" didn't have any special value then,
and you said you referred to when you bought it. I
am asking you when you got this letter of April 2nd,
1954——

A. Oh, that's clear.

Q. ——have you built up any value since then?

A. Yes, I have built up a business there, a good
business.

Q. Then the principal value that attaches to the
name you built up since then?

A. Since the letter?

Q. Yes.

A. What date was that letter, sir?

Q. That letter is dated April 2nd, 1954.

A. Oh, no, before that. [28]

Q. Well, have you built up any since then?

A. I don't get that.

Q. Now don't ask your counsel.

A. I am all mixed up. I am sorry.

Mr. Magid: If you don't understand the ques-
on, say so.

The Witness: I don't understand the question,
r.

Q. (By Mr. Sterry): You bought into a busi-
ness or you formed a limited partnership by a con-

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

tract which you haven't produced yet but will if you can, of a store that was operating at this same place under the name "Safeway Furniture Company." You said at that time the word "Safeway" didn't have any special value; that it has a value now only because you built up a good will to it.

A. That is right.

Q. Now, I am asking you when that good will started.

A. When I bought the other fellows out I started to put all my time in there day and night, and I worked up a business in Safeway Furniture Company.

Q. You bought a business and you have been steadily increasing it? A. Yes, sir.

Q. All right. You bought in in 1952?

A. Yes, sir.

Q. And you bought them out in 1953?

A. Right. [29]

Q. What time in '53?

A. I don't have those dates.

Q. I am asking you in '53 approximately when.

A. The early part of the year '53.

Q. Then it has been about three years ago?

A. Yes, sir.

Q. It is your idea that the business you built up under this name, you started building it up from the time you bought them out? A. Yes, sir.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. And you have been gradually increasing it all the time? A. Yes, sir.

Q. Then it has increased quite a bit since this letter of April 2nd, which is almost two years ago?

A. Yes, sir.

Q. That letter was received about a year, then, after you bought them out? A. Yes, sir.

Q. Then the good will which you claim to be building up under this name had been starting for about a year and has been increasing during the last two years?

A. Yes, sir. You will have to forgive me because I have never had anything like this.

Mr. Magid: Just sit back and relax.

Q. (By Mr. Sterry): What proportion of your present [30] good will would you say has been built up in the last two years? A. I wouldn't know.

Q. It has been increasing gradually right along at about the same increase?

A. I wouldn't know unless I looked at my books.

Q. Have you got your gross sales for the first year after you bought the other two people out?

Mr. Magid: Off the record.

(Discussion outside the record.)

Mr. Magid: The accountant has those figures, Mr. Sterry.

Mr. Sterry: Wait a minute gentlemen. I think at your convenience we'd better continue the further taking of the deposition until you can get those

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

things exactly and see whether or not you can get your partnership articles. I will continue it at your convenience. I don't like to ask a man to guess because my experience has been that sometimes they get very wrong.

Mr. Magid: Let's put it this way, Mr. Sterry. We will submit to you the figures that our accountant will furnish us as to the gross sales for the calendar years——

Mr. Sterry: No, what I'd like to do is this. I would like to know precisely when he bought these other two gentlemen out whose names escape me.

Mr. Magid: I'll get you that. [31]

Mr. Sterry: Then I would like the gross sales and the net sales from then on until the end of that calendar year, and each calendar year thereafter, along with the advertising expenses.

Mr. Magid: The advertising expenses you have. We are furnishing you with those now.

Mr. Sterry: These that you hand me are the advertising expenses?

Mr. Magid: Yes. It must have been April of 1952, that you bought them out. Here it is. See that?

The Witness: Then that's when it was.

Mr. Magid: It should be around April 1, 1952. That's when it starts.

The Witness: All right.

Mr. Sterry: Mr. Magid, I see here you have April 1st, 1952, and you have the figures from April

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

1st, 1952. Now, I don't want at the trial to come in and have Mr. Rudner say that that was a mistake, and it might be. I assume that it is correct?

Mr. Magid: It is the only figures we have.

Mr. Sterry: I know. Now, have you got any extra copies of this photograph?

Mr. Magid: Yes.

Mr. Sterry: If I can, I would like to offer this photograph as our Exhibit B, and you can put it in my copy of the deposition. [32]

(The photograph referred to was thereupon marked Plaintiff's Exhibit B for identification.)

Mr. Sterry: I now offer in evidence as our Exhibit C the statement of advertising expense. Will you mark that "C"? Then I want to examine the witness about it.

(The document referred to was thereupon marked Plaintiff's Exhibit C for identification.)

Mr. Sterry: Have you got a copy of this, Mr. Magid?

Mr. Magid: Unfortunately, no. I just have the original.

Q. (By Mr. Sterry): Do I understand now that you purchased the store on April 1st, 1952?

A. Whatever it says.

Q. That's what is shown.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

A. That must be it, then. My accountant got this together.

Q. I know, but on this Exhibit C we have 4/1/52, then 4/1/53, 4/1/54, and 4/1/55, so I assuming for the present that you purchased your interest in the partnership 4/1/52 and it was about a year later that you bought them out and became sole proprietor except for the few months that your son had a partnership? A. Yes, sir.

Q. Now, for the year 4/1/52 you have \$11,928.56 for advertising, for your next year 4/1/53 you have \$14,788.44, a drop in the year 4/1/54 to \$8,885.56, and the [33] year 4/1/55 it was \$2,304.05.

Now, apparently, according to this, you have been doing less advertising each year? A. Yes, sir.

Q. What is the reason for that?

A. Well, a lot of new stores have come into our neighborhood and brought more people into town without advertising. Before that I did a lot of display advertising and after that I kind of cut down and went into classified, which is cheaper.

Q. What do you mean by "classified"?

A. In the back of the paper. This is classified. It's a lot cheaper than display advertising.

Q. Well, I want you to furnish the exact date and be certain that it was April 1st, 1952, that you bought them out and then the exact date when you became sole proprietor. I also want your gross and net sales from then on until the present time, including up to the first of April of this year. This isn't

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

the first of April but you can make it the first of March because I understand that accountants always want to be about a month behind. Then I want you to see if you can find your limited partnership agreement and the date. Now, I don't think it will be over an hour's examination. What time would be convenient to you, Mr. Magid, to continue the deposition?

The Witness: I have a sick wife. [34]

Mr. Magid: I know you have a sick wife, but just relax. I will first have to get the papers from the accountant. I want to say to you in all sincerity when I got these figures today I should have gotten the gross and net sales because I asked for them, and you are asking me now to give you an answer based upon somebody else giving me some information. This is his tax season so the Lord only knows. Now, my next free day will be April 3rd.

Q. (By Mr. Sterry): Who is your accountant?

A. Sidney Gittler.

Q. Where is his office?

A. On Beverly Boulevard.

Q. Do you know the number?

A. No. I can look it up in the book. It is Gittler & Associates, or Gittler Associates, isn't it?

Q. Is Gittler the man who takes care of it?

A. Yes, sir. He has taken care of my books ever since I have been in business.

Mr. Sterry: All right. Now, Mr. Magid, I am perfectly willing to accommodate you. I realize if

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

he is an accountant at tax time he is probably very busy. I am perfectly willing to continue this to any time that is reasonably agreeable to you and your client. After the first of April I will probably be unable to give it any attention until after the 20th. The case is set for the 21st of May.

Mr. Magid: The 26th of April would be convenient for [35] me.

Mr. Sterry: What date is that?

Mr. Magid: April 26th, which will be exactly four or five weeks from today. By that time I am sure we will have the information.

Mr. Sterry: April 26th is agreeable to me. Do you want it in the morning or in the afternoon?

Mr. Magid: No, the afternoon.

Mr. Sterry: We would also like a breakdown of just what the advertising was and the papers and so forth. All we want to do is just get the facts, Mr. Magid.

Mr. Whelan: This was going to be offered, wasn't it, for the deposition?

Mr. Sterry: Yes.

Mr. Whelan: I wanted him to check that that was a true copy. The "Received" came through from the back side.

Mr. Magid: O.K.

Mr. Sterry: What did you say came through?

Mr. Magid: My "Received" stamp.

Mr. Sterry: That was on the back?

Mr. Magid: Yes.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Mr. Whelan: And it came through.

Mr. Sterry: I will ask you to mark this photostat and it will be understood that the "Received" which appears on the face of it was on the back of the original and in photostating it came through as on the face. [36]

Mr. Whelan: That is on the copy of the letter your client received, Mr. Magid?

Mr. Magid: Yes.

Now, let me repeat what you want, Mr. Sterry. You want the name and date——

Mr. Sterry: I'll tell you, Mr. Magid. Let me put it this way. We have specified these things. You will probably want a copy of this before then, but to avoid any chance of misunderstanding Marty will write out in the next day or two exactly what we want and send it to you.

Mr. Magid: Will you be prepared, Mr. Sterry, on the continued date, so that we don't have to write a lot of things, to admit that the plaintiff has sales for the calendar year of 1955 \$1,738,889,565.00, which was an increase of 6.18 per cent over sales for the previous year?

Mr. Sterry: Are you taking those from the figures we sent you?

Mr. Magid: No, I am taking these from the newspaper report of Safeway Stores and I am asking if you would be prepared at the next session to admit them.

Mr. Sterry: No, I won't be prepared. If you will

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

write me what it is I will write up to their accountant. That way I can tell you very easily whether we will admit it or whether we won't.

Mr. Whelan: Before we continue this, Mr. Sterry, there might be a couple of more things we can get out of the way [37] at this time. I think one we ought to ask them for is a copy of the agreement at the time he bought out the two partners.

Mr. Sterry: We have asked them for that.

Mr. Whelan: No, we just asked them for the limited partnership agreement.

Mr. Sterry: That was it, wasn't it?

The Witness: That was it.

Mr. Whelan: Didn't you have an additional agreement when you bought out Kiefer and Simms?

Mr. Sterry: We will send you a list of what we want.

The Witness: O.K.

Mr. Sterry: As to the figures, I have absolutely no knowledge as to the amount of sales we had at any time except as they are furnished me by my client.

Mr. Whelan: What time do you want to continue that deposition to?

Mr. Magid: 2:00 p.m.

Mr. Whelan: 2:00 p.m., at the same place?

Mr. Magid: At the same place.

Mr. Sterry: If there is anything to their sales, they have audits and there will be no trouble admitting anything that is correct, but I won't admit

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

something from a newspaper. Anything you want on that you can ask either formally or you don't have to ask for it formally; if you will send it to me in time so I can write up there I will [38] get it.

Mr. Magid: We will do that.

Now, in response to your request for admissions——

Mr. Sterry: You don't have to take this, or do you want him to take it?

Mr. Magid: No, you don't have to take it.

(Discussion outside the record.)

Mr. Sterry: All right, supposing you go ahead.

Mr. Whelan: Just for clarification of the record let me state that counsel for the defendant is now making certain admissions with regard to plaintiff's request for admissions filed on March 15, 1956.

Mr. Sterry: All right.

Mr. Magid: We will admit your Request No. 1 and No. 2 except that in No. 2 we deny that the corporation is now existing.

We admit No. 3, No. 4 and No. 5.

As for No. 6, we admit everything except that the co-partnership is not a citizen because it no longer exists.

Mr. Sterry: In other words, you admit that it was but that Mr. Rudner is now the sole proprietor?

Mr. Magid: Right.

We admit No. 7. We admit No. 8. We deny No. 9. We deny No. 10.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Mr. Sterry: Well, I think the proper form is that you do not admit 9 or 10. [39]

Mr. Magid: We do not admit 9 and we do not admit No. 10.

We do not admit that part of No. 11 because we do not know that the plaintiff's stores have rendered such items as mops, brooms, furniture polish and floor wax.

Mr. Sterry: Otherwise you admit it?

Mr. Magid: Otherwise it is admitted.

We do not admit No. 12. We do not admit——

Mr. Sterry: Wait just a minute. Let me note something on mine.

No. 12 you don't admit?

Mr. Magid: No. 12 is not admitted.

Mr. Sterry: Now, No. 13.

Mr. Magid: No. 13 is not admitted.

Mr. Sterry: No. 14?

Mr. Magid: No. 14——

Mr. Sterry: Those are the advertisements.

Mr. Magid: Yes. I want to admit them all in one.

No. 14 through No. 28 are admitted. No. 29 is not admitted. No. 30 is admitted.

Mr. Whelan: Is admitted?

Mr. Magid: Yes.

No. 31 is not admitted.

Now, is it 32 that you want the figures changed?

Mr. Sterry: These figures are the correct figures. It is the complaint that left off one number. [40]

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Mr. Magid: Do you want to send me a letter stipulating——

Mr. Whelan: ——that the complaint can be amended?

Mr. Magid: Yes. Then we admit No. 32 and No. 33——

Mr. Sterry: You admit 33?

Mr. Magid: Wait a minute. Let's see what parts of it we don't.

Mr. Whelan: 33 is the short one. Of course, it takes in the whole affidavit.

Mr. Magid: It takes in the affidavit and I want to read it.

We will admit 31.

Mr. Sterry: 31?

Mr. Magid: Or 33.

As to 34 we admit the first sentence only and do not admit the balance.

Mr. Sterry: You admit the first sentence of 34 but not the balance?

Mr. Magid: Right.

Mr. Sterry: All right.

Mr. Magid: That covers all of your requests.

Mr. Whelan: This is off the record.

(Discussion outside the record.)

Mr. Sterry: Mr. Magid, I think so far as I am concerned your admissions here should be entirely sufficient, but the deposition isn't closed and can't be closed until after [41] we have examined him

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

and, for the record, I think I will ask Marty to draw up a stipulation following that and just send it to you and you can check it.

Mr. Magid: O.K.

Mr. Sterry: Then we will stipulate that that will be in the place of an answer.

Mr. Magid: Fine.

Mr. Sterry: It is also stipulated that your admissions here are a matter of record and the other is simply a supplement.

Mr. Magid: Very well.

Mr. Sterry: I am sorry to ask you to come back, Mr. Rudner, but that's part of the job. We will get you a letter of the various things we want.

Mr. Magid: Yes.

(Whereupon the deposition was continued until 2:00 p.m. Thursday, April 26, 1956.) [42]

(The taking of the deposition of Morris Rudner was resumed on Thursday, April 26, 1956, at 10:00 a.m., at 634 South Spring Street, Los Angeles, California; Gibson, Dunn & Crutcher, by Martin E. Whelan, Jr., appearing for the plaintiff; William B. Magid, Esq., appearing for the defendants, and the following proceedings were had:)

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Direct Examination

(Continued)

Mr. Whelan: Referring to this letter where we requested certain documents, I was wondering what you were able to dig up here.

Mr. Magid: Pretty much every one except the No. 1. We have the notice of cancellation of certificate. That's your No. 2.

Mr. Whelan: Do you mind if I see what you have?

(The document referred to was passed to Mr. Whelan.)

Q. (By Mr. Whelan): Mr. Rudner, your attorney has given me a copy, apparently a signed copy of a notice of cancellation of certificate to articles of limited partnership. It states here in effect that you and Frank Kiefer were terminating your limited partnership. That is dated May 14, 1953. Is that approximately the date? Do you remember the specific date now on which you terminated that partnership, or was it on or about that date?

A. It was within a radius of a couple of weeks.

Q. A couple of weeks of May 14, '53? [43]

A. Yes. I don't remember dates very much.

Mr. Magid: You've got them right here.

The Witness: Yes.

Q. (By Mr. Whelan): It was within a couple

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

of weeks of that time? A. Yes.

Q. I notice that Sam Simms isn't mentioned in there. Did he get out before that? A. Yes, sir.

Q. About how long before?

A. About there or four months before.

Q. So it was about two weeks before May 14, 1953, perhaps, that you eventually became sole owner and after that, or shortly after that you and your son became partners. Is that correct?

A. That is correct.

Mr. Whelan: I don't think we need to keep this.

Mr. Magid: I don't think so. It's a matter of record, anyhow.

Mr. Whelan: Could I see what else you've got?

Mr. Magid: Yes. We have these letter contracts which led to the notice of cancellation or followed it.

Mr. Whelan: We'll go off the record a second.

(Discussion outside the record.)

Mr. Whelan: We'll go back on the record.

Q. (By Mr. Whelan): Your Counsel has furnished me a [44] copy which is also a signed copy, Mr. Rudner, of an agreement between you and Frank Kiefer on May 14, 1953, or dated that date. Is that the agreement whereby you purchased from him his interest in the partnership?

A. Yes, sir.

Q. Would you care to just place your initials, perhaps, on the first page of that, just for identification?

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

(Witness marks on document.)

Mr. Whelan: May it be stipulated that if any portion of this agreement is asked for by plaintiffs for use in court, that this particular document which has been signed will be produced, after it has been returned by us to you?

Mr. Magid: Yes, so stipulated.

Mr. Whelan: Now, what else do you have there, Mr. Magid?

Mr. Magid: We have the lease of the premises dated May 1, 1953, wherein Mr. Rudner is the lessee.

Q. (By Mr. Whelan): Before we go into anything more, Mr. Rudner, did you have any agreement between you and Kiefer, on the one hand, and Simms, on the other, when he pulled out of the partnership?

A. When he pulled out of the partnership it went on like it was. See?

Q. I meant did you have any agreement with him whereby you purchased his interest at the time?

A. No. It just went on. He pulled out. He got paid, you know, and he pulled out and we just kept on going. [45]

Q. He was paid, but you didn't enter into any formal agreement at the time? A. No.

Mr. Whelan: We can go off the record a second.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

(Discussion outside the record.)

Mr. Whelan: We'll go back on the record.

Q. (By Mr. Whelan): I show you a statement which sets forth the sales for certain periods broken down from 4-1-1952 through 2-20-1956.

A. My accountant made this up. He has all my books.

Mr. Magid: Just wait until the question is asked.

The Witness: Excuse me.

Q. (By Mr. Whelan): I assume your accountant did make that up and not you personally?

A. Yes.

Q. I believe we had the accountant's name previously in the last deposition? A. Yes.

Q. Will you repeat it, just in case we need that?

Mr. Magid: What is his full name?

The Witness: Sidney Gittler.

Q. (By Mr. Whelan): I notice this does not include the net sales. Is this figure gross sales, do you know?

Mr. Magid: It must be gross.

Mr. Whelan: Did you have many copies made up of this?

Mr. Magid: No, just the original and one copy is all [46] I've got.

Mr. Whelan: Would you mark this for identification?

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

(The document referred to was thereupon marked Plaintiff's Exhibit D.)

Mr. Whelan: I will submit for attachment to the deposition the document marked Plaintiff's Exhibit D, which I think we will stipulate is the analysis of sales and advertising expense which counsel for the defendant has submitted to me here.

Mr. Magid: Right.

Q. (By Mr. Whelan): Mr. Rudner, on March 15th a set of requests for admissions were filed by plaintiffs, which your counsel answered at the last portion of this deposition. Now, Request No. 29 was at that time denied. That request states that the advertisements designated in each of the requests numbered 14 through 28 above, and each of them, were inserted in the Van Nuys News at the instance and request of defendant Safeway Furniture Co., a partnership, Morris Rudner, Gerald Rudner, and each of them, the format and composition of each of said advertisements was made up by the aforesaid defendants, and each of them, the advertisements, and each of them, were paid for by the aforesaid defendants, and each of them. Now, at that time your counsel admitted that those particular advertisements, 14 through 28, had appeared in the Van Nuys News. I was wondering why you denied our Request No. 29. [47]

A. I didn't make them up. You see, the news-

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

paper man came in—you know what I mean—and would make them up for us.

Q. When the newspaper man came in, he came in at your request, did he?

A. They come around each week for an ad.

Q. Were these particular ads inserted either at your request or at the request of one of your employees acting for you?

A. It could be both ways.

Q. But in any particular case would it be one or the other? A. Yes.

Q. We are now speaking of those particular advertisements that were numbered 14 through 28 in the request for admissions? A. Yes.

Q. Those were inserted in the Van Nuys News either pursuant to your request or an employee acting for you? A. Yes, sir.

Q. You paid for those ads, then?

A. Yes, sir.

Q. Now, Mr. Rudner, have you during the period of your operation of the store on Van Nuys Boulevard—and I am speaking now first of the period after which you bought out Kiefer and Simms and were either sole proprietor [48] or in partnership with your son—have you had any complaints from customers relative to your practices or methods?

Mr. Magid: That is objected to as not being within the issue of the case.

Mr. Whelan: Well, I believe it is within the is-

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

sues since one of the issues is the effect on the name of Safeway Stores, and accordingly, any particular complaint would be pertinent.

Mr. Magid: Complaints about what?

Mr. Whelan: Complaints about his sales methods and practices.

Mr. Magid: Well, O.K.

Q. (By Mr. Whelan): Do you understand the question, Mr. Rudner?

A. Could I have it again, sir?

Q. Have you since——

Mr. Magid: Let the reporter read it.

(Record read.)

The Witness: All businesses have. I have had a few, yes.

Q. (By Mr. Whelan): By "a few" how many?

A. I don't remember how many.

Q. Do you keep a file of those complaints?

A. Not necessarily.

Q. Do you have any file of complaints that have been [49] made?

A. We just try to rectify them. That's all. In fact——

Mr. Magid: You have answered the question.

The Witness: All right.

Q. (By Mr. Whelan): Do you recall now the names of any of the individuals who made complaints? A. No, sir; I don't.

Q. Do you remember the nature of any of them?

A. No, sir; I don't.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. What about prior to the time you purchased out Kiefer's and Simms' interest? Did you have many complaints at that time?

A. I had a few, yes, that I took care of, that belonged to them when I took over the store.

Q. Would you say that those were more or less than after you took over the store?

A. I would say they were a few more.

Q. Have you ever had any lawsuits instituted against you arising out of the operation of this store?

A. Yes, sir.

Q. How many? A. One or two.

Q. Do you remember the names of the other parties in those lawsuits?

A. Price is the only one I can remember. [50]

Q. Where was that action brought, do you remember what court?

A. It was down in Los Angeles here. I don't remember the court.

Q. Do you remember whether it was in Municipal Court or Superior?

A. Municipal.

Q. You mean you think it was the Municipal Court of Los Angeles?

A. Yes.

Q. Do you remember any others and what courts they were brought in?

A. I had one in San Fernando, in Small Claims Court, a couple of years ago. That's about all.

Q. Do you remember any others in addition to those two?

A. No, sir.

Q. That includes the period both during which

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

you were sole proprietor and in partnership with your son and in partnership with Kiefer and Simms? A. Yes.

Q. Do you know at all what your gross profit margin is without referring to your books? Do you know what your normal net profit margin runs?

A. No, sir. My auditor is supposed to give me a P&L statement but he never gives it to me. [51]

Q. You mean you don't know how much you make out of the business in a year's period?

A. I make a good living. That's all I know.

Q. But you don't know even roughly the amount that you have made for any year?

A. No, not unless I would get into the books with my accountant.

Mr. Whelan: I think that's all I have, then. Do you have any further questions you want to ask?

Cross-Examination

By Mr. Magid:

Q. Did you ever have any customer come into your store who said they thought they were in a store belonging to plaintiff, Safeway Stores?

A. No. I have furniture signs up above there.

Q. Just answer the question, please.

Did you ever have anybody come into your store and ask for groceries, meats, produce, or household supplies? A. No, sir.

Q. Have any of your customers ever inquired as to whether you were a branch or——

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Mr. Whelan: Well, Mr. Magid, I prefer that you don't place completely leading questions in front of him.

Mr. Magid: I am quoting from your complaint.

Mr. Whelan: Well, I know, but you are now questioning [52] your own witness, and I will object to the form of the question.

Q. (By Mr. Magid): Has anybody ever come into your store——

Mr. Whelan: My objection is on the ground that the question is leading.

Mr. Magid: O.K.

Q. (By Mr. Magid): Has anybody ever come into your store and asked whether you were a subdivision of Safeway Stores, the plaintiff herein?

A. No, sir.

Mr. Magid: Let's go off the record.

(Discussion outside the record.)

Q. (By Mr. Magid): Has anybody ever come into your store saying that they believed that the plaintiff, Safeway Stores, is identified or connected with or is sponsoring your store?

Mr. Whelan: Same objection; a leading question.

Q. (By Mr. Magid): Will you answer that? Then you can go into the form at the time of trial.

A. No, sir.

Q. Did you adopt and use the name "Safeway

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Furniture" for the sole purpose of trading upon the good will of Safeway Stores? A. No, sir.

Q. As a matter of fact, the name "Safeway Furniture Stores" [53] was not adopted by you but purchased by you. Is that correct? A. Yes, sir.

Mr. Magid: That's all I have.

Redirect Examination

By Mr. Whelan:

Q. Mr. Rudner, what furniture items besides the normal ones I assume you would handle, such as sofas and chairs, beds and bedroom sets, do you handle?

A. Stoves, refrigerators, washers.

Q. Any other appliances? A. Sweepers.

Q. What? Carpet sweepers or vacuum cleaners?

A. No, electric sweepers.

Q. Any other items? Do you handle smaller appliances? A. Radios and TV.

Q. Radio and television? A. Yes.

Q. Do you handle items like electric toasters and things of that sort? A. No, sir.

Q. Do you handle, for instance, television tables? A. To go with table models, yes.

Q. Do you handle smaller tables for breakfast nooks [54] and kitchens?

A. Breakfast sets, yes, sir.

Q. Chairs, I assume, and things of that sort?

A. They're regular sets, the chairs and tables.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Q. I see. Do you handle any miscellaneous items for the living room, such as bookshelves and items of that sort? A. Bookcases, yes.

Q. Magazine racks?

A. I haven't bought any. You can never tell when I will buy some. I haven't bought any.

Mr. Magid: Just answer the question.

The Witness: Oh, I am sorry.

Q. (By Mr. Whelan): Do you ever have customers coming in and asking for items that you haven't stocked, such as, maybe, some particular item of furniture that in your practice you haven't used, and appliances like toasters or anything of that sort? A. No, sir.

Q. Has anybody ever inquired for outdoor furniture? A. No, sir.

Mr. Whelan: I think that is all.

Mr. Magid: That is all.

Mr. Whelan: Do you want to stipulate it may be signed before any Notary Public, and if not signed and filed prior to the trial that copies of the deposition may be used [55] without signature?

Mr. Magid: So stipulated.

/s/ MORRIS RUDNER.

Subscribed and sworn to before me this 17th day of May, 1956.

[Seal] /s/ WILLIAM B. MAGID,

Notary Public in and for the
State of California. [56]

State of California,
County of Los Angeles—ss.

I, Horace E. Snyders, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify that Morris Rudner, the witness named in the foregoing deposition, was, before the commencement of deposition, duly sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was taken, pursuant to Notice on File at the time and place as herein set forth; that said deposition was taken down in shorthand by me and thereafter transcribed into type-writing, and I hereby certify the foregoing 56 pages contain a full, true and correct transcription of my shorthand notes so taken.

I further certify that it was stipulated by counsel that said deposition may be read, corrected and signed by the witness before any notary public in and for the County of Los Angeles, State of California.

I further certify that I am neither counsel for nor related to any party to said action, nor in any-wise interested in the outcome thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, this 2nd day of May, 1956.

[Seal] /s/ HORACE E. SNYDERS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 21, 1956.

Received in evidence May 25, 1956. [57]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 97, inclusive, contain the original

Complaint;

Answer;

Plaintiff's Request for Admissions;

Stipulation Allowing Amendment by Interlineation to Complaint and Order Thereon;

Stipulations and Orders (3);

Order Dismissing Parties;

Memorandum of Opinion;

Findings of Fact & Conclusions of Law (Lodged);

Judgment (Lodged);

Objections to Findings of Fact & Conclusions of Law and to the form of judgment;

Findings of Fact & Conclusions of Law; and Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

which, together with 1 volume of reporter's transcript of proceedings; and plaintiff's exhibits 1-11, inclusive and defendant's exhibits A & B, all in the

above-entitled case, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit all in this case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 21st day of September, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 2, inclusive, contain the original

. Petition for an Ex Parte Order Extending
Time for Filing Record on Appeal and Docket-
ing the Appeal;

in the above-entitled case, constitute the supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

Witness my hand and seal of the said District Court this 3rd day of October, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15294. United States Court of Appeals for the Ninth Circuit. Safeway Stores, Incorporated, Appellant, vs. Safeway Furniture Co., Inc., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15294

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

SAFEWAY FURNITURE CO., Inc., et al.,

Appellees.

STIPULATION AS TO ORIGINAL EXHIBITS

A. The parties hereto respectfully request that the following designated Trial Exhibits, because of their nature, be considered by the Court in their original form and that the Court dispense with their reproduction in the printed transcript of the records:

(1) Plaintiff-Appellant's Exhibits 1, 2, 3, 4, 5-A to 5-F, inclusive, 6, 7, and 11.

(2) Defendant-Appellees' Exhibit A.

B. The parties hereto respectfully request that the following designated Exhibits to Plaintiff-Appellant's Requests for Admissions filed March 15, 1956, because of their nature, be considered by the Court in their original form, that the Court dispense with their reproduction in the printed transcript of the record and permit them to be de-

tached from said Requests for Admissions so that said Requests for Admissions may be printed.

(1) Exhibits A through Q, inclusive, as incorporated in said Plaintiff-Appellant's Requests for Admissions.

Dated: September 25, 1956.

Requests for Admissions may be printed.

Dated: September 25, 1956.

GIBSON, DUNN & CRUTCHER
NORMAN S. STERRY,

By /s/ NORMAN S. STERRY,
Attorneys for Appellant.

/s/ WILLIAM B. MAGID,
Attorney for Appellees.

[Endorsed]: Filed September 26, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION RELATIVE TO FURNISHING COPIES OF EXHIBITS

Whereas, the parties hereto through their respective undersigned attorneys of record have by stipulation requested that the above-entitled Court dispense with the reproduction in the printed record of certain Exhibits in the above-entitled appeal;

Whereas, it is contemplated that the above-entitled Court will proceed in accordance with said request;

Now Therefore, in the event that the above-entitled Court grants said request, then it is stipulated by and between the parties to the above-entitled appeal, by and through their respective undersigned attorneys of record, that appellant may furnish to the Court three photostatic, or other reproduced copies, of the following Exhibits for its use:

- (1) Plaintiff-Appellant's Trial Exhibits 1, 2, 3, 4, 5-A to 5-F, inclusive, 6, 7 and 11.
- (2) Defendant-Appellees' Trial Exhibit A.
- (3) Exhibits A through Q, inclusive, as incorporated in Plaintiff-Appellant's Requests for Admissions.

It is Further Stipulated and Agreed that appellant will furnish counsel for appellees a set of said photostatic copies, or other reproductions, falling within subparagraphs (1) and (2) above, it being understood that said counsel for appellees has a full set of Exhibits A through Q of said Requests for Admissions.

It is Further Stipulated and Agreed that the costs of five sets of photostatic copies, or other reproductions of the Exhibits in categories (1) and (2) above and the costs of three sets of photostatic copies, or other reproductions, of the Exhibits falling in category (3) above, shall be taxable as costs on appeal.

Dated: September 25, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,

By /s/ NORMAN S. STERRY,,
Attorneys for Appellant.

/s/ WILLIAM B. MAGID,
Attorney for Appellees.

[Endorsed]: Filed September 26, 1956.

[Title of Court of Appeals and Cause.]

DESIGNATION OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Pursuant to Rule 17 (6) of the Rules of this Court, appellant designates the following as the points on which it intends to rely:

(1) The Findings of Fact and Conclusions of Law do not support the judgment in favor of Defendant. On the contrary, the Findings of Fact show that Plaintiff was entitled to the injunction relief prayed for.

(2) The Court below erred in not adding to the last sentence of Finding of Fact No. IV the following as requested by Plaintiff:

“* * * and other articles normally carried by the average furniture company, and plaintiff

intends to extend the sale of such items to its stores in Los Angeles.”

(3) The Court below erred in not adding to the last sentence of Finding of Fact No. V the following, as requested by Plaintiff:

“* * * and the goods sold by it.”

(4) Findings of Fact Nos. IX, X, XI, XII, XIII and XIV are each not supported by the evidence and are each contrary to the undisputed evidence. The Court below erred in failing to find exactly the opposite on all facts covered by each Finding of Fact Nos. IX through XIV, inclusive.

(5) Insofar as Conclusion of Law No. X purports to incorporate into the Findings of Fact and Conclusions of Law of the Court, the Memorandum of Opinion of the Court dated June 18, 1956, and insofar as said Memorandum of Opinion may have become a Finding of Fact (which appellant does not concede) the following Findings therein are not supported by the evidence and are contrary to the undisputed evidence and indeed the exact contrary is established by the undisputed evidence:

(a) that portion of the opinion which purports to find that Defendant did not change the name of his business because it would entail considerable expense;

(b) that portion of the opinion which purports to find that Defendant has not attempted to trade upon the reputation and name of Plaintiff;

(c) that portion of the opinion which purports to find that there is no competition between Plaintiff and Defendant;

(d) that portion of the opinion which purports to find that there has been no confusion in the minds of the public between Plaintiff's stores and Defendant's furniture store;

(e) that portion of the opinion which purports to find that there have been many other businesses using the name "Safeway" since 1925;

(f) that portion of the opinion which purports to find that there is little likelihood of confusion so long as Plaintiff continues to operate a retail food and grocery market and Defendant continues to operate a retail furniture store;

(g) that portion of the opinion which purports to find that Plaintiff's protection must be limited to the retail trade definitely connected and associated with the sale of commodities usually found in a retail grocery and food store;

(h) that portion of the opinion which states or finds as a fact that the Defendant operated his store in Van Nuys under the name of Safeway Furniture Company, Inc., instead of under the name of Safeway Furniture or Safeway Furniture Co., and the finding or implication in the opinion that the Defendant was operating in Reseda through Safeway Furniture Company, Inc., a defunct corporation as to which the suit had been

dismissed, a store under the name of Safeway Furniture Company, Inc.

(6) Conclusions of Law Nos. III, IV, V, VI, VII, VIII, IX and X are each unsupported by the evidence, are each contrary to the uncontradicted evidence, and are each unsupported by the Findings of Fact.

(7) The Court erred in sustaining the Defendant's objection to the following question put to the witness Bauer:

“Q. Now, Mr. Bauer, I would ask you whether or not in your opinion, from your studying of the advertisements and advertising, those three advertisements of the defendant in this case would or would not cause damage to the plaintiff.”

and erred in sustaining the objection to the following offer of proof by the Plaintiff:

“Mr. Sterry: If your Honor please, let me state what I expect to prove by him, and then if your Honor rules that I can't prove it, why, I shall have to bow to your Honor's ruling.

“I want to show by him that he is qualified, first, as an expert, he has been studying advertising, has been studying those things, that even assuming that a person was not confused by the advertising, that it would nevertheless have a tendency to cause confusion to the buying public in that if anybody patronized this

store, and it was generally known as Safeway Furniture, and they stated, for instance, that they were dissatisfied with any deal, if they stated they got gypped or were dissatisfied with the deal at Safeway, that that would redound, would be detrimental to the plaintiff. Now that, I believe, is the subject of expert testimony.” (Tr. pp. 12-14, l. 23-14.)

The Court similarly erred in rejecting a similar offer of proof as to witness S. M. White.

(8) The Court erred in sustaining the objection of the Defendant to the following question put to the witness Frank Denney:

“Q. What has been the tendency, if any, of your competitors to sell merchandise of that character?” (Tr. p. 35, l. 1-2.)

(9) The Court erred in sustaining the Defendant’s objection to a question put to him while being examined by the Plaintiff as an adverse witness:

“Q. You knew, didn’t you, that they had built up a very high and valuable good will under that name?” (Tr. p. 116, l. 4-5.)

(10) The Court below erred in overruling Plaintiff’s objection to the introduction by Defendant of so much of Defendant’s Exhibit “A,” a stipulation dated May 16, 1956, and filed in the Court below on May 21, 1956, as related to filings of fictitious and corporate names in the office of the County Clerk of Los Angeles County.

(11) The Court below erred in considering the telephone directory showing the number of businesses listed in whose business name the word "Safeway" appeared, such telephone directory not having been in evidence.

(12) The Court below based the essential Findings of Fact and Conclusions of Law (Findings of Fact Nos. XIII and XIV; Conclusions of Law Nos. VI, VII, VIII and IX) upon completely erroneous misconceptions of the law applicable which infected those findings and conclusions.

(13) The Court erred (a) in failing to make any finding on Plaintiff's normal and legitimate area of product expansion in Los Angeles County; (b) in failing to find that the sale of furniture items is within Plaintiff's normal and legitimate area of product expansion; (c) in failing to make any finding as to the likelihood of confusion which might result from such expansion; and (d) in failing to find that confusion was likely to result from such expansion.

(14) The Court erred in failing to make a Finding of Fact that Defendant's use of the name "Safeway" would dilute the distinctiveness of Plaintiff's trade name, or at least to make some finding on this question.

(15) The evidence indisputably establishes (a) Plaintiff's right to restrain Defendant's use of the name "Safeway"; and (b) Plaintiff's right to enjoin Defendant from misleading advertising.

Dated: September 26, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 27, 1956.

No. 15294
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

SAFEWAY FURNITURE CO., INC., *et al.*,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF FOR APPELLANT.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

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634 South Spring Street,
Los Angeles 14, California,

Attorneys for Plaintiff and Appellant.

FILED

JAN 10 1957

PAUL P. O'BRIEN, CLERK



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(The Roman or Arabic numbers following any of the above abbreviations will indicate the page or paragraph referred to.)

No. 15294

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

SAFEWAY FURNITURE CO., INC., *et al.*,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF FOR APPELLANT.

Statement of Jurisdiction.

Jurisdiction of the District Court was predicated upon the diversity of citizenship of the parties and the amount involved being in excess of \$3,000, exclusive of interests and costs.

The action sought to enjoin the use by defendants of plaintiff's trade name "Safeway", the alleged and admitted value of which to plaintiff in California was between 20 and 25 million dollars [R. 11], and its total value through the United States and Canada, 75 million dollars [R. 11].

The court denied plaintiff any relief.

The District Court had jurisdiction of the action by virtue of the Act of June 25, 1948, c. 646, Sec. 1, 62 Stat. 930, 28 U. S. C. (1952 ed.) Sec. 1332. The jurisdiction of this court on appeal to review the judgment of the District Court exists under the Act of June 25, 1948, c. 646, Sec. 1, 62 Stat. 929, 28 U. S. C. (1952 ed.) 1291 and upon the Act of June 25, 1948, c. 646, Sec. 1, 62 Stat. 930, 28 U. S. C. (1952 ed.) 1294.

Statement of the Case.

We shall refer to the parties as they appeared in the court below as “plaintiff” and “defendant”.

The action was instituted on December 1, 1954, against Morris Rudner, his wife Rose Rudner, his son Gerald Rudner, and the Safeway Furniture Co., Inc., a California corporation organized by the individual defendants. The action sought to enjoin the corporation from attempting to further operate under the name of Safeway Furniture Co., Inc., and to enjoin Morris and Gerald Rudner, as copartners, from operating a store in Van Nuys under the name of Safeway Furniture or Safeway Furniture Company [R. 20-21].

At the time of the trial, May 24, 1956, the corporate defendant had ceased to do business, having forfeited its charter, the store formerly operated at Reseda by it being conducted by the purchaser under an entirely different name; the only store being operated by any of the defendants at the time of the trial under the name of “Safeway” being the one at Van Nuys initially operated by Morris Rudner and his son as copartners. However, the son had withdrawn from the partnership and Morris Rudner was the sole proprietor of the Van Nuys store.

Hence, the action was dismissed without prejudice as to all defendants other than Morris Rudner [R. 183-185, 186-187, 88, 53-54]. While the averments of the complaint are as to the actions of the defendants, we shall, only refer to them as allegations of the actions of Morris Rudner.

The complaint alleged the appropriation by the plaintiff's predecessors in interest in 1926 of the word "Safeway" and the continuous use from 1926 by plaintiff and its predecessors of the word "Safeway" as their trade name, either alone or in combination with "Stores" and "Stores Incorporated", the expenditure of vast sums in advertising plaintiff's business under the name of "Safeway" and the building up of a very vast and profitable business under that name [R. 3-22].

The complaint then alleged that Morris Rudner, in co-partnership with his son Gerald, operated a furniture store under the fictitious name of Safeway Furniture Company at 6416 Van Nuys Boulevard in Van Nuys [C. XXIII, R. 13]; that the adoption of the name Safeway Furniture Company was for the purpose of trading upon the good will and reputation established by the plaintiff under said name [C. XXVIII, R. 15-16].

It was then alleged that the defendant improperly used the word "Safeway" in the advertisement of his business in that "Safeway" was the most prominent in defendant's advertisements and was printed and copied in the block lettering used by the plaintiff, and in imitation of and to resemble plaintiff's use of its trade name Safeway [C. XXX, R. 16-17].

The complaint prayed that the defendants be enjoined from using the name "Safeway" in the conduct of the Van Nuys store and any future store conducted by the corporate defendant; in the alternate, that defendants be enjoined from the improper advertising of the name "Safeway" [R. 20-21].

The answer, while admitting the appropriation of the name "Safeway" by plaintiff's predecessors in interest in 1926 and the continuous use by plaintiff and its predecessors in interest and its vast advertisement of "Safeway", denied plaintiff's right to the exclusive use of that word, denied any intent by defendants to trade upon the good will which plaintiff's advertising and business methods had created in the name "Safeway", and alleged the use of the name "Safeway" by a number of other persons in the County of Los Angeles. The answer denied all allegations of improper advertising by defendants or the alleged improper motive for such alleged advertising [R. 22-28].

UNCONTROVERTED FACTS.

The following uncontroverted facts were established at the trial by either: (1) the allegations of the complaint which were either directly admitted by the answer or by its failure to deny them; (2) the answers to the request for admissions; (3) stipulations of the parties; and (4) the uncontradicted testimony introduced at the trial.

In 1925, plaintiff's predecessors in interest commenced the operation of a chain of stores throughout California and a number of states of the Union in which groceries, meats, food products and certain articles of household

equipment were sold [C. VII,* R. 5; Aff.**, R. 137-139; RA No. 7; AA No. 7, R. 29-30, 41; R. 202, Pltf. Ex. 11 in Folder of Trial Exhibits]; that commencing in 1929 the said chain of stores had been extended through the Dominion of Canada [C. VII, R. 5]; that plaintiff has succeeded to all of the rights and interests of its predecessors in interest [C. VII, R. 5; Aff., R. 139; RA No. 8, AA No. 8, R. 30, 41]; that plaintiff has continuously maintained a number of retail stores in San Fernando Valley, there being fourteen stores in said San Fernando Valley in 1927 and twenty-three stores on May 15, 1956 [R. 47]; that as a result of plaintiff's and its predecessors' method of conducting business and advertising, plaintiff's business has grown steadily, and at the time of the filing of the action plaintiff was operating 1,867 retail stores in California, the District of Columbia and 23 other states, and through a wholly owned subsidiary, 141 stores in the Provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario, Canada. Of its stores in the United States, it operated approximately 489 in the State of California, 282 of which were in its Los Angeles Distribution Division, 175 being in Los Angeles County [C. X-XI, R. 6-7]; that in 1926, plaintiff's predecessors adopted the *arbitrary, coined and distinctive trade name*

*Where paragraphs of the complaint are cited as authority for undisputed facts, those paragraphs contain allegations which are either specifically admitted or not denied by the answer.

**Mr. Wilde's affidavit was Exhibit "Q" to plaintiff's Request for Admissions and the truth of its averments was admitted by the answer to Request No. 33 [R. 41]. The entire affidavit was read into evidence and is in the printed Record pp. 136-141. It is also contained in the Exhibits which it was stipulated could be considered by the Court without being printed [R. 269-270]. Citations to the affidavit will be to the printed portions of the record.

“Safeway” for use by them and their affiliated retail stores and in their various advertisements [C. XII, R. 7-8]; that since the adoption of the word “Safeway” plaintiff and its affiliates and predecessors in interest have continuously used the word “Safeway” both alone and in combination with the words “Stores Incorporated” and “Stores”, the name “Safeway” being placed conspicuously on each of its offices, warehouses and stores in Southern California [C. XIV, R. 8-9; C. XVII, R. 10; RA No. 7, AA No. 7, R. 29-30, 41; RA No. 11, AA No. 11, R. 31, 42; R. 44-47]; *that at least since December 31, 1942, all stores operated in California by plaintiff were operated solely under the name of “Safeway”, all Stores’ signs and advertising being conducted under that name* [Aff., R. 141; R. 47]; that Safeway has acquired a secondary meaning throughout the United States and especially in Southern California indicating the plaintiff and the retail business conducted by it [FF IV, V, VI, R. 76-77, 91, 97, 98-99, 103-104, 167-168; C. XIV, R. 8-9; C. XVI, R. 10; C. XIX, XX, R. 11-12; RA No. 7, AA No. 7, R. 29-30, 41; RA No. 11, AA No. 11, R. 31, 42].

Indeed, the court announced that it would take judicial notice of its secondary meaning [R. 134, 168, 188]. In fact, defendant in his deposition which was admitted in evidence [R. 197], testified that before the suit he had not known that the name of the plaintiff was Safeway Stores, Incorporated, never having heard it referred to other than as Safeway [R. 227-228].

That the advertising expense of the plaintiff and its predecessors in interest in connection with the word “Safeway” in Southern California from July 1, 1926, through

1941, was \$3,993,552.21; that in advertising the name "Safeway" between the years 1942 and 1953 the plaintiff has expended throughout the United States and Canada \$92,942,471, of which \$22,410,000 has been expended in California and \$11,916,000 of which was expended in Southern California [C. XIV, R. 8-9; R. 44-45]; that as a result of plaintiff's vast advertising expenditures and its methods of doing business, and its efforts to give the best service at the lowest prices, plaintiff and its affiliates have built up a reputation for the name "Safeway" which is of the value of 75 million dollars, of which 20 to 25 million is allocable to California [C. XV, XVI, R. 10; C. XIX, R. 11; FF VI, R. 77].

Plaintiff's sales have been steadily increasing. During the calendar year ending December 31, 1953, its total sales throughout the United States and Canada amounted to \$1,578,400,000, of which \$431,309,000 were in California [C. XVIII, R. 10-11; RA No. 32, AA No. 32; R. 36-37, 41]; such use of the trade name "Safeway" by plaintiff has been so extensive that for many years Safeway has been known to the public in California and Southern California as "the commercial signature of a reliable retailer who sells products of a high quality at reasonable prices" [C. XX, R. 11-12].

Plaintiff introduced in evidence a large number of advertisements by both itself and defendant. Additionally, in response to Requests for Admissions Nos. 14-28, defendant admitted that numerous other advertisements contained as Exhibits to said Requests were those of his Van Nuys store [R. 32-35, 41]. In his deposition which was admitted in evidence [R. 197], plaintiff testified these

were inserted either by himself or under his authorization [R. 257-258]. Because of the impossibility of reproducing the exact appearance of these various advertisements and the desire of the parties that the court examine the originals, by stipulation printing of them was dispensed with [R. 269-270]. By separate stipulation it was provided that the appellant could deliver to the clerk of the court three sets of folders containing photostats of the various advertisements. We have accordingly handed to the Clerk two sets of three folders, one labeled "Folder of Trial Exhibits" and the other "Folder of Exhibits to Requests for Admissions". Copies of the contents of said folders have, of course, been delivered to counsel for appellee.

As the advertising of defendant of the word "Safeway" is discussed under the second subdivision of Point I, it is sufficient to state that any inspection of the advertisements will show that in one the defendant used *only* the word "Safeway" and in most if not all of the others, Safeway was the most conspicuous word, and "furniture" and "furniture company" when Company was used, being printed in much smaller letters. Further, the script and block letters of the word "Safeway" were the same as used in the plaintiff's advertisements.

The evidence at the trial showed that while the plaintiff in its Los Angeles Division had sold only a very limited number of items that are usually purchasable at furniture stores, in many of its Divisions plaintiff had for a number of years been selling a large and varied line of household furniture such as hassocks, T.V. tables, chairs and outdoor furniture such as lawn chairs, patio tables, etc.,

and "a whole host of products that would fall under furniture classification" [R. 107-108, 111-112, 158-159; Exs. 4, 5-A, 5-F in Folder of Trial Exhibits], as well as cooking utensils, houseware and dishes [R. 113-114]; that plaintiff had recently placed a new manager in charge of its Los Angeles Division, Mr. W. A. Christensen (formerly Manager of its Oklahoma Division); and that he intended to sell in the stores in the Los Angeles Division all of the articles of furniture above enumerated and was at the time of the trial in the process of including such items in plaintiff's sales and advertisements [R. 154, 155-157, 159, 164-165].

Defendant acquired an interest in the Van Nuys store in April, 1952 [R. 184, 218, 220]. The store had been operated under the name Safeway Furniture Company for about two years by Kiefer and Simms [R. 184-185, 219]. A special partnership was formed in which Kiefer and Simms were the special partners and defendant the general partner, the same continuing for about a year when defendant acquired the interest of the special partners [R. 185, 220]. As stated, defendant's son, Gerald Rudner, was a partner with him for a short time, but had ceased to be a partner at the time of the trial, defendant Morris Rudner then being the sole owner. The defendant's store has been operated variously as "SAFEWAY," "SAFEWAY furniture" and "SAFEWAY furniture company." [R. 184, 191-192, 257-258; Exs. 1, 2, 3 and 6 in Folder of Trial Exhibits; Exs. A through O, in Folder of Exhibits to Requests for Admissions.] As indicated, in defendant's advertisements, the word "SAFEWAY" was in large type and the words "furniture" and "furniture company", when company was used, were in smaller type

so that a person glancing at the advertisements and not reading them carefully would notice only the word "SAFEWAY."

Defendant admitted that he knew at the time he acquired an interest in the Van Nuys store of the chain of stores which plaintiff operated under the name of Safeway [R. 187-188, 227-228]. As before noted, he testified in his deposition which was admitted in evidence [R. 197] that during the six years he had lived in Los Angeles prior to buying into the store at Van Nuys he knew of Safeway Stores, but did not know that plaintiff had any other name than Safeway until the suit [R. 227-228]. We quote the last question and answer on that subject:

"Q. You never heard anything except 'Safeway'?"

"A. That's all I ever heard." [R. 228.]

Although the court, for some unexplainable reason, refused to permit the defendant to be examined as to whether he knew that any good will had attached to that name [R. 188], the court found, as hereafter stated, that "Safeway" was not used by defendant with any intention of trading upon the good will that attached to "Safeway." [FF XI, R. 78-79.]

The only witness in defendant's behalf was himself. Defendant made no attempt to contradict the secondary meaning that the word Safeway had acquired, but contented himself merely with giving a description and the character of the furniture he sold, denying that he sold most, if any, of the articles of furniture, which plaintiff sold in any of its stores [R. 204-205], that he did not use the name Safeway Furniture or Safeway Furniture

Company for the “*sole*” purpose of trading upon its good name [R. 206]; that he had never had any customer ask if defendant was affiliated with the plaintiff or if plaintiff was sponsoring defendant’s store. [R. 206.]

Defendant also introduced in evidence one very small classified advertisement appearing in the Examiner May 20, 1956, entitled “Safeway Open Front Warehouse Sale! 8510 So. Broadway” [R. 207; Ex. “A” of the Folder of Trial Exhibits].

Defendant received in due course of mail a letter written by plaintiff’s attorneys under date of October 20, 1953, demanding that he cease and desist from using the word Safeway [R. 193-194; Ex. 7 in Folder of Trial Exhibits].

We believe the foregoing is a condensed, but entirely comprehensive and accurate statement of the undisputed and uncontroverted facts disclosed by the Record upon which plaintiff submitted to the court its claim for relief. We do not believe defendant will question it.

At the conclusion of the evidence the court stated: “I think there is only one issue in this case that I am interested in, and that issue can be summed up in the words of the court in the case of Phillips v. The Governor as to whether or not the two stores had to be in competition.” [R. 211-212.] See prior comments of court to same effect during the trial [R. 146-151, 157].

The court, on the 18th of June, 1956, filed its written Opinion in which it is specifically found that the plaintiff and its predecessors in interest have continuously used the name “Safeway” since 1925 and its secondary meaning as alleged in the complaint [R. 54-55], but found

that there was no competition between the parties, and on that ground denied plaintiff any relief whatever, the court thus stating the reasons for such denial (emphasis ours):

“In the case at bar the Court is of the opinion there is no competition between the parties hereto of like merchandise; there has been no confusion between the parties’ products, and there is *little* likelihood of confusion *so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store*. We cannot agree with plaintiff that it is entitled to protection of the word ‘Safeway’ in the entire retail business in Southern California. Its protection must be limited to the retail trade *definitely connected and associated with sale of commodities usually found in a retail grocery and food store.*” [R. 60.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Findings of Fact and Conclusions of Law, entered following the opinion, of course, were generally in conformity with the views of the court expressed during the trial and in its written Opinion.

In Findings I, II and III the court found diversity of citizenship and that it had jurisdiction of the action [R. 75-76]. In Finding IV [R. 76], the court found that the plaintiff and its predecessors in interest since 1925 had operated a large chain of stores throughout California and other states of the Union and Canada in which it sold retail food and groceries, meats, vegetables, incidental notions, kitchenware, furniture polish, floor wax and expendable items that are used in maintaining a house; that in cer-

tain of its stores in Districts other than Los Angeles, plaintiff has sold various items of household furniture such as T.V. tables, hassocks, lawn chairs, dishes, glassware and other articles of tableware. Finding V reads as follows (emphasis ours):

“That in 1926 plaintiff adopted as a trade name the word ‘Safeway’ for use by itself and its affiliated companies. For a short period plaintiff advertised under both the name of ‘Safeway’ and ‘Safeway Stores’. That at the time of filing this action and ever since and for at *least ten years* prior to the opening of defendant’s store by defendant’s predecessors in interest, *plaintiff has advertised extensively under the name ‘Safeway’ and the word ‘Safeway’ has obtained a secondary meaning throughout the State of California, and especially in Southern California, as indicating the chain of stores operated by the plaintiff.*” [R. 76-77.]

The court found that there was no competition between the parties [FF XIV, R. 79], and found against all the allegations of the plaintiff as to alleged improper advertising of the word Safeway by defendant [FF IX, X and XI, R. 77-79]. On the foregoing Findings of Fact, the court concluded that it had jurisdiction of the action [Con. I, R. 80] but that because there was no competition between the parties, and no showing of confusion the plaintiff was not entitled to any relief of any character [Con. VII, VIII and IX, R. 81].

QUESTIONS FOR DECISION BY THIS COURT.

The decision of the court below presents five questions of transcendent importance, not only to the plaintiff but to the entire commercial world:

1. Is there any evidentiary support of the findings that there was no competition between the parties?

2. Where a retailer has included in its corporate or fictitious name a unique or coined word and has used that single word in the advertisement of the retailer's merchandise and has spent millions in such advertising, and that single word has obtained a *state* and *nation-wide* secondary meaning as indicating to everyone the retailer and his business and the goods he sells, can a *second* retailer, many years after the secondary meaning has attached to the word, include that word in the corporate or fictitious name under which the second retailer attempts to sell a different line of merchandise?

3. In the situation outlined in the foregoing question, has the second retailer the right not only to employ the word "Safeway" in his trade name but to advertise the sale of a different line of merchandise under the name of "Safeway" by doing as the evidence shows the defendant has done, either using in its advertisement the word "Safeway" alone, or advertising as either "Safeway Furniture" or "Safeway Furniture Company", and in such advertisements making the word "Safeway" the dominant portion by printing it in very large letters in exact imitation of the plaintiff's advertisements, and the word "Furniture" or "Furniture Company" in smaller letters, so that "Safeway" is the one word the average person casually glancing at the advertisement will see?

For brevity, we have and shall refer to such advertising as "improper advertising."

4. In the situation outlined in the first question, is it necessary, in order to enable the first merchant to prevent the second merchant from using his trade name, to introduce any evidence of actual confusion to the public?

5. In the situation outlined in the first question, can the second retailer justify his wrongful use of the first retailer's trade name and the improper advertising of it by showing that others may also have improperly used the name, especially when there is no evidence or suggestion that such other users have improperly advertised the said trade name?

Reason, logic, and the decisions of this and the California courts require an emphatic answer in the negative to each of the foregoing questions.

There is no specific finding or conclusion of the court that presents the fifth question, but aside from the defendant's claim of no competition, the use of the word "Safeway" by others was the only defense relied on by defendant, and we are certain he will urge it in defense of the judgment appealed from. In addition to this, the court commented throughout the trial on the use by others of plaintiff's trade name [R. 129-136, 142-145]. In his written memorandum the court commented on it in such a manner as to indicate that such use might be the basis for the limited protection to which he concluded the plaintiff was entitled. For this reason, we feel we are justified if not required to cite the numerous decisions of this and other courts, that it is no defense to an action to enjoin the use of a merchant's trade name to show that others have used the name.

We shall discuss each of the five questions above outlined separately under four main headings or points, inverting questions three and four and combining one and two in our first point under appropriate subheads. We shall include in our presentation of the points above outlined the errors of the court in its Findings of Fact and Conclusions of Law and rulings on the admissibility of testimony set out in our Specifications of Errors.

Unless otherwise noted, all emphasis throughout the Argument will be ours.

SPECIFICATIONS OF ERRORS RELIED ON.*

1. The judgment is contrary to law and is not supported by the Findings of Fact. Under the uncontroverted facts disclosed by the record, and also on the specific facts found by the court, plaintiff is entitled to an injunction as prayed for, enjoining the defendant from using the word "Safeway" in its fictitious name, and also from improperly advertising his merchandise under plaintiff's trade name "Safeway".

2. The court erred in Finding No. IX to the effect that defendant did not adopt the name "Safeway" for the purpose of fraudulently and illegally competing with the plaintiff, said finding not being supported by, but contrary to the evidence and law. The court further erred in finding that defendant did not adopt the name because of purchasing an interest in an existing company known

*The following technical Specifications of Errors are set out to comply with Rule 18 of this Court, but they will not be separately discussed, the errors of the court in its Findings and Conclusions and rulings on the admissibility of testimony being discussed, as above indicated, in the presentation of the four main points above outlined.

as the “Safeway Furniture Company”, and erred in finding defendant continued said name simply because it would be costly and expensive to change the name. If a finding of fact, it is unsupported by and contrary to the evidence that defendant did not buy into a company but purchased an interest in a partnership using a fictitious name, and his retention of that name constituted an adoption of it, and the expense for changing a name is not a justification in law for the defendant’s continuing unlawfully to use the plaintiff’s trade name. Further, the evidence shows defendant continued the use of plaintiff’s trade name for the purpose of trading on the good will of plaintiff’s trade name.

3. The court erred in making Finding X to the effect that defendant’s advertising was not carried on in a way to convey the idea that the defendant’s sales were made with and sponsored by plaintiff, said finding not being supported by but is contrary to the evidence.

4. The court erred in making Finding XI to the effect that defendant’s advertisements were not printed so as to cause the word “Safeway” to be the most prominent part of such advertisement, or for the purpose of trading upon the name, reputation and standing of plaintiff, said finding not being supported by but is contrary to the evidence.

5. The court erred in making Finding XII to the effect that defendant’s use of the name “Safeway” would not lead the public to believe the standard of plaintiff’s business or services had fallen or would fall, said finding not being supported by but is contrary to the evidence.

6. The court erred in making Finding XIII to the effect that the use of the name “Safeway Furniture Com-

pany” would not cause confusion in the minds of the public between plaintiff’s merchandise and defendant’s, or that anyone had not been misled by the similarity of names, said finding not being supported by but contrary to the evidence. The court further erred in finding that there would be little likelihood of confusion “so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store.” If a finding of fact, it was not supported by the evidence but contrary thereto, and ignored the undisputed evidence that plaintiff had been selling large amounts of household furniture long prior to the adoption by defendant’s predecessors in interest of the name “Safeway Furniture Company.” Said finding further places an unreasonable limitation and restriction upon the plaintiff’s right to expand its business.

7. The court erred in making Finding XIV to the effect that there was no competition between the plaintiff and defendant, said finding not being supported by but is contrary to the evidence.

8. The court erred in failing to find upon the issue presented by the pleadings that the use of “Safeway” by defendant would dilute plaintiff’s good will value in said name.

9. The court erred in making Conclusion III to the effect that there was no confusion between the plaintiff’s store and the defendant’s store. If the same be a conclusion it is not supported by the specific facts found, and if it is a finding of fact it is not supported by but is contrary to the evidence.

10. The court erred in making Conclusion IV to the effect that there was no competition between the plaintiff’s store and the defendant’s store. If the same be a conclusion it is not supported by the specific facts found, and if it is a finding of fact it is not supported by but is contrary to the evidence.

11. The court erred in making Conclusion V to the effect that no one has been misled by defendant's use of the name "Safeway Furniture Company". If the same be a conclusion it is not supported by the specific facts found, and if it is a finding of fact it is not supported by but is contrary to the evidence.

12. The court erred in making Conclusion VI to the effect that plaintiff has not been damaged by the use by the defendant of the name "Safeway Furniture Company". If the same be a conclusion it is not supported by the specific facts found, and if it is a finding of fact it is not supported by but is contrary to the evidence.

13. The court erred in making Conclusions VII and VIII to the effect that the plaintiff is not entitled to an injunction or to any relief. Said conclusion is erroneous, contrary to law, and is not supported by the specific facts found in Findings I, IV, V, VI and VII.

14. The court erred in making Conclusion IX to the effect that plaintiff is entitled to protection of the name "Safeway" only as it pertained to the retail trade connected and associated with the sale of commodities usually found in retail grocery stores and food markets. The conclusion is erroneous, and is not supported by but is contrary to the law, and is not supported by the specific facts found in Findings IV, V, VI and VII.

15. The court erred in making Conclusion X. If the said conclusion makes the opinion of the court a part of the Court's Formal Findings of Fact and Conclusions of Law the said opinion erred in the facts which it purported to find and failed to find for the same reasons set out in the preceding Specifications, 1 to 8 inclusive. The opinion erred in the legal conclusions set out in said opinion for the same reasons set out in Specifications 9 to 14 inclusive.

16. The court was also in error in said Opinion in finding or concluding that the defendant has the right to employ the word "Safeway" in his fictitious name under which he did business because he did not adopt that word but bought an interest in a store already being operated under the name "Safeway"; said finding or conclusion being contrary to law.

17. The court erred in sustaining the defendant's objection to the following question put to the witness Bauer:

"Q. Now, Mr. Bauer, I would ask you whether or not in your opinion, from your studying of the advertisements and advertising, those three advertisements of the defendant in this case would or would not cause damage to the plaintiff?" [R. 95]

and erred in sustaining the defendant's objection to the following offer of proof by the plaintiff:

"Mr. Sterry: If your Honor please, let me state what I expect to prove by him, and then if your Honor rules that I can't prove it, why, I shall have to bow to your Honor's ruling.

"I want to show by him that he is qualified, first, as an expert, he has been studying advertising, has been studying those things, that even assuming that a person was not confused by the advertising, that it would nevertheless have a tendency to cause confusion to the buying public in that if anybody patronized this store, and it was generally known as Safeway Furniture, and they stated, for instance, that they were dissatisfied with any deal, if they stated they got gypped or were dissatisfied with the deal at Safeway, that that would redound, would be detrimental to the plaintiff. Now that, I believe, is the subject of expert testimony." [R. 96.]

18. The court erred in rejecting the plaintiff's offer of proof by the witness S. M. White:

"Mr. Sterry: Mr. Whelan calls my attention, if your Honor please, to this, and I want to make the same offer of proof with reference to the confusion of the advertisements of the Safeway that have been introduced in evidence that I made to Mr. —

"The Court: The advertisements speak for themselves. They are before the court.

"Mr. Sterry: Your Honor, I submit to your ruling. I am not trying to get your Honor to reverse it. I am simply saying I want to make the same offer now, and I assume your Honor will sustain an objection.

"The Court: Same ruling, Mr. Sterry." [R. 169-170.]

19. The court erred in sustaining the objection of the defendant to the following question put to the witness Frank Denney:

"Q. What has been the tendency, if any, of your competitors to sell merchandise of that character?" [R. 116.]

20. The court erred in sustaining the defendant's objection to a question put to him while being examined by the plaintiff as an adverse witness:

"Q. You knew, didn't you, that they had built up a very high and valuable good will under that name?" [R. 188.]

21. The court erred in overruling plaintiff's objection to the introduction by defendant of so much of defendant's Exhibit "A," a stipulation dated May 16, 1956, and filed in the court below on May 21, 1956, as related to filings of fictitious and corporate names in the office of the County Clerk of Los Angeles County.

ARGUMENT.

I.

The Court Erred in Its Findings That the Parties Are Not in Competition and Erred in Its Conclusions That It Was Necessary to Show That There Was Competition Between Them in Order to Enable the Plaintiff to Enjoin the Defendant (1) From Using Plaintiff's Trade Name, and (2) From Advertising Defendant's Merchandise Under Plaintiff's Trade Name. The Court Also Erred in Declining to Allow the Plaintiff to Show That Items of Household Furniture Were Usually Sold in Food Markets.

The heading presents three closely related questions of the utmost importance to the entire retail world. We will present them separately under appropriate subheads.

- (1) THE COURT WAS IN ERROR IN FINDING THAT THE PARTIES WERE NOT IN COMPETITION. THE FINDING WAS DIRECTLY CONTRARY TO THE UNDISPUTED EVIDENCE AND PROBATIVE FACTS FOUND BY THE COURT.

It is apparent from the record that the court's decision that the parties were not in competition arose from the court's misconception that to be in competition they had to sell exactly the same line of merchandise or conduct exactly the same character of store.

The testimony showed without any controversy that the plaintiff was operating a large chain of stores in which the majority of the merchandise it sold was groceries, meats and vegetables, but it was also selling a line of household furniture, Mr. Denney, Manager of plaintiff's non-food Purchasing Division testifying:

"The Court: Does the Safeway Stores handle furniture?"

“The Witness: Yes, Safeway Stores does.

“The Court: What kind of furniture?

“The Witness: We handle such things as lawn chairs, hassocks, TV tables—*just a whole host of products that would fall under the furniture classification.*” [R. 107.]

The evidence also showed without controversy that while only a very limited line of articles of household appliances had been sold in the Los Angeles Division, the plaintiff was intending to sell in the Los Angeles Division all of the extensive lines of household furniture and household equipment carried in its other divisions [R. 112-113, 154, 155-157, 159, 164-165].

This evidence was uncontradicted. Indeed the court found:

“In certain of its stores in Districts other than Los Angeles, plaintiff has sold various items of household furniture such as T.V. tables, hassocks, lawn chairs, dishes, glassware and other articles of tableware.” [FF. IV, R. 76.]

It is thus apparent that stores of the parties were in competition.

It is true that the defendant testified that he was not selling any of the lines of furniture that the plaintiff sold, but we do not apprehend that merchandise of two retailers must be identical for it to be held that they are in competition, so as to prevent one from using the trade name of the other. Moreover, it is obvious that the defendant at any time he desires can add to his line of merchandise. It is certain that if the plaintiff through its advertising and method of sales builds up good will for the furniture and household equipment it sells, plaintiff can easily add such merchandise to his stock.

The court's remarks during the trial clearly indicate that it gave no heed to the above consideration, but based its findings of lack of competition upon the court's belief that for the parties to be in competition it would be actually necessary for the plaintiff to operate a furniture store or the defendant to undertake the sale of food.

We quote the questions and remarks of the court during the examination of Mr. Christensen.

"The Court: May I ask this witness a question?

"Mr. Sterry: Certainly, your Honor.

"The Court: Does Safeway Stores intend to go into the furniture business here in Los Angeles? When I say furniture business, I mean the common, ordinary understanding of the word furniture.

"The Witness: I think I understand what you mean. In other words, go into the general line, start selling a general line of furniture? We do not intend to do that.

"The Court: You intend to sell special articles?

"The Witness: That's right. We will sell first one thing and then another in the furniture line. We have been doing that in the past where I came from."
[R. 156.]

On Cross-Examination

* * * * *

"The Court: This witness has testified they don't intend to go into the general furniture business.

* * * * *

"The Court: I suppose it can be stipulated that the defendant does not sell food products or meat or vegetables, Mr. Sterry?

"Mr. Sterry: There is no issue on that point.

"The Court: The only thing he sells is furniture.

"Mr. Sterry: Yes." [R. 161-162.]

We submit that the court's conception of what constituted competition was erroneous and is directly contrary to the decision of this court in *Safeway Stores, Incorporated v. Dunnell* (9th Cir. 1949), 172 F. 2d 649, hereinafter often referred to as the *Dunnell* case. In that case the action was instituted by Dunnell against the defendant for a declaration that Dunnell was entitled to register the trade mark "Safe Way" for toilet seat covers which he was manufacturing and selling to a sanitary service which furnished them free to public lavatories. The defendant therein (plaintiff herein), in addition to denying that the plaintiff was entitled to the declaration prayed for, filed a counterclaim seeking to restrain the plaintiff from using the words "Safe Way" in the course of his business or in selling toilet seat covers. The District Court granted the relief prayed for by plaintiff and denied the prayer of the counterclaim upon the ground that the parties were not in competition. This court reversed upon the ground as we shall show under the next subdivision that "Safeway" was the trade name of the defendant and appellant (plaintiff and appellant herein) that competition was not necessary in order for it to prevent others from using its trade name.

This court held however, that the mere fact that defendant at the moment was not selling seat covers did not show that the parties were not in competition, pointing out that the defendant had sold toilet tissues which could be used for seat covers and that to regard the parties as not in competition would unduly limit the right of appellant to expand its merchandise to include seat covers.

We submit that in view of the uncontradicted evidence in this case and the specific findings of the court that its conclusions that there was no competition between the parties cannot be reconciled either with logic or with the decision of this Court in the *Dunnell* case.

- (2) THE COURT ERRED IN REFUSING TO ALLOW THE PLAINTIFF TO SHOW THAT AT THE PRESENT TIME ITEMS OF HOUSEHOLD FURNITURE SUCH AS IT WAS SELLING IN OTHER OF ITS DIVISIONS AND WHICH IT PLANS TO SELL IN THE LOS ANGELES DIVISION ARE FOUND IN MOST FOOD MARKETS.

Mr. Denney, while being examined as to the character of such of non-food items sold by plaintiff, on the objection of defendant was prevented from testifying that furniture was sold by competitors.

“Q. What has been the tendency, if any, of your competitors to sell merchandise of that character?”

“Mr. Magid: I object to that, if the court please, not being within the issues of this case, irrelevant, immaterial.

“The Court: Mr. Sterry, I know the tendency of most of the supermarkets *is to go in all lines of business. In fact, there are even some who are selling clothing.*

“Mr. Sterry: Yes.

“The Court: But I don’t think it has a thing to do with this case. *The question here is whether or not the plaintiff has a right to preclude the defendant from using the word Safeway.*” [R. 116.]

It is a little difficult to understand the basis of the ruling of the court in view of its conclusion that the protection of plaintiff’s name was limited “to the retail trade definitely connected and associated with sale of commodities *usually* found in a retail grocery and food store.”

If that conclusion is correct, *upon what possible theory can it be said that it was entirely immaterial whether the average supermarket, which of course is a food store,*

sold household furniture? It surely cannot be the law that a merchant who has established a good will value of \$75,000,000 for his trade name cannot prevent another merchant from selling merchandise of the same classification merely because the great bulk of the goods of the two merchants are not of the same general character.

We shall await with great curiosity defendant's reply.

- (3) THE COURT ERRED IN HOLDING THAT NOTWITHSTANDING "SAFEWAY" HAD ACQUIRED A SECONDARY MEANING INDICATING THE PLAINTIFF AND ITS MERCHANDISE AND HAD BECOME THE TRADE NAME OF THE PLAINTIFF, THE COURT COULD NOT ENJOIN THE DEFENDANT FROM USING PLAINTIFF'S TRADE NAME BECAUSE OF LACK OF COMPETITION IN THE MERCHANDISE SOLD BY THE PARTIES.

The court, because of its erroneous conception that the parties were not in competition, concluded:

"Plaintiff is entitled to the protection of the word 'Safeway' only insofar as it pertains to the retail trade *definitely connected and associated with sale of commodities usually found in a retail grocery and food store.*" [Con. IX, R. 81.]

We believe that the slightest consideration will show that even if the above conclusion were held to be correct,—and we do not believe it can be,—the decree entered by the court below must be reversed.

If, as the court concluded, the protection afforded to plaintiff's trade name is limited to commodities usually found in retail grocery and food stores, the court was in error in declining to allow the plaintiff to show that today, items of household furniture are usually sold in such stores.

Such error, of course, would be prejudicial unless it be conceded,—as we think it must be,—that the court's observation that it would take judicial notice of the fact that under present day conditions super food markets "go into all lines of business, in fact, there are even some who are selling clothing." If this observation was correct,—and there can be no question of it,—obviously the mere fact that the majority of plaintiff's merchandise was meats and groceries could not prevent it from receiving full protection for its trade name as to all other items of merchandise it sold or that were usually sold in food markets.

It certainly cannot be the law that where a retailer has adopted a unique or coined word which has acquired a secondary meaning as indicating the retailer and his goods and has developed a good will value in that secondary meaning of his trade name of many millions of dollars, that another retailer, after the development of the value of that name, can use the trade name *merely because he sells only a portion of the same general class of merchandise as does the original appropriator*.

However, in discussing the error of the above quoted conclusion of the court, we shall assume, contrary to the evidence and the facts we offered to prove, and contrary to the facts found by the court and those of which the court stated he would take judicial notice, that the parties were not in competition.

It may be observed that if the conclusion of the court below is correct, a trade name will have very little, if any, value, *especially if, as in the case at bar, the later user of the first retailer's trade name can sell the same general items of merchandise, providing that the bulk of the sales of the two merchants are of a different character*.

Of what advantage would it be to a merchant to select a fanciful, distinctive or coined word as his trade name,

and by his methods of conducting his business and vast advertising create a secondary meaning for it as indicating himself and the goods he sells, if any and every other merchant not selling *precisely* the same merchandise can sell his goods under the trade name of the first merchant? Obviously, as soon as a valuable good will is built up for a trade name, any number of other retailers, the major portion of whose merchandise is not precisely similar to the merchandise of the appropriator of the trade name, will adopt it in an attempt to gain advantage from its good will.

It is equally obvious that the original appropriator of a fanciful, unique or coined name would have no control over the way other retailers selling goods under his trade name conducted their business, and obviously many of them could greatly tarnish it.

The observations of the Court of Custom and Patent Appeals in *Radio Corporation of America v. Rayon Corporation of America* (C. C. P. A. 1943), 139 F. 2d 833, 837, where the court held that the respondent was not entitled to register "RCA Fabric" although the appellant made no fabrics, are most pertinent:

"So in the case at bar if appellee were permitted to use and register the notation 'RCA' which has come to represent to the public the appellant Radio Corporation of America, *other companies likewise might use it upon different products with resultant loss of identity of the Radio Corporation of America.*"

In the instant case, not only does the record show and the court found that "Safeway" had a secondary meaning indicating only the plaintiff, but the decisions show that such secondary meaning had existed for many years and was state and nation-wide. Indeed, as long ago as 1949, this Court held in the *Dunnell* case, *supra*, 172 F. 2d

649, 654, the word "Safeway" was a coined word and was plaintiff's trade name, saying:

" 'Safeway' is a coined word not appearing in the dictionary."

If the defendant can sell and advertise furniture under plaintiff's trade name, so can the bootmaker, clothing store, jeweler or any other merchant selling various lines of goods not usually found in grocery or food stores. Due to the enormous good will value attaching to the word "Safeway," because of plaintiff's vast advertising and business methods, it is certain that if one retailer is judicially allowed to use it, innumerable others, large and small, who are just starting or who do not have an effective trade name, will employ "Safeway."

Waiving the point that in this day, when most stores sell all classes of merchandise, it is difficult to know just what articles are to be found in grocery and food stores, it is evident that the use of plaintiff's trade name by a large number of other retailers will greatly dilute the value of it, especially if they advertise their merchandise, as has the defendant, under the name of "Safeway," either using it alone or making it the most prominent part of their advertisement.

Further, plaintiff will have no control over the way and method that such merchandisers conduct their business, and it is certain that some of them will very greatly tarnish the name of "Safeway" by the method and manner in which they conduct business and treat their customers.

However, the decisions of this Court as well as of other State and Federal Courts, and especially of California are so numerous, uniform and unbroken, that competition is unnecessary, that further argument as to the court's misconception of the protection afforded a trade name is unnecessary.

Logically, we should undoubtedly first present the statutes and decisions of California, since it is settled beyond question that in a case such as this where jurisdiction of the Federal Court exists only because of diversity of citizenship the extent of the protection afforded a trade mark or trade name is governed by the law of the state where it is claimed the name was improperly used. *Pecheur Lozenge Co. v. National Candy Co.* (1942), 315 U. S. 666, 667; 86 L. Ed. 1103, 1105; *United Drug Co. v. Rectanus Co.* (1918), 248 U. S. 90, 98; 63 L. Ed. 141, 146; *Sunbeam Furniture Corporation v. Sunbeam Corporation* (9th Cir. 1951), 191 F. 2d 141, 145; *American Photographic Pub. Co. v. Ziff-Davis Pub. Co.* (7th Cir. 1943), 135 F. 2d 569, 572; *Socony-Vacuum Oil Company v. Rosen* (6th Cir. 1940), 108 F. 2d 632, 635.

Indeed, the statutes of California clearly make competition unnecessary and have been so interpreted not only by the California decisions but by this Court in *Stork Restaurant, Inc. v. Sahati* (9th Cir. 1948), 166 F. 2d 348, 354, and also by the court below in *Hotels Statler Co. v. Chase* (S. D. Cal. 1952), 104 F. Supp. 533, 537.

While the California statutes and the decisions were called to the attention of the court below, it did not pay the slightest attention to them nor to the fact that the defendant did not attempt to distinguish any of the decisions in this State or to argue that under the law of California competition was necessary. The court, based its decision wholly upon its belief that this Court in *Fairway Foods v. Fairway Markets* (9th Cir. 1955), 227 F. 2d 193, sometimes referred to as the "Fairway case," and *Robert C. Wian Enterprises, Inc. v. Persinger* (9th Cir. 1955), 229 F. 2d 154, sometimes referred to as the "Big Boy case," had departed from its prior unbroken line of decisions that competition was not necessary [R.59-60, 146-151, 157].

For that reason, we will first present the decisions of this court on that subject, and shall show that the two decisions relied on by the court below not only do not intimate any intention of this court to depart from its prior decisions, but, on the contrary, the *Big Boy* case impliedly, and the *Fairway* case directly reaffirmed the rule of those decisions.

Decisions of This Court That Competition Is Unnecessary.

The leading and most cited case on the subject is *Yale Electric Corporation v. Robertson* (2 Cir. 1928), 26 F. 2d 972, hereinafter sometimes referred to as the "Yale case." We cite it before citing the decisions of this court because all of them are based upon its philosophy and most of them cite and quote from it.

In the *Yale* case in answer to the appellant's contention that the goods manufactured and sold by the two parties were not in competition with each other, the Second Circuit, speaking through Learned Hand, said:

"However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. *His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control.* This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, *and another can use it only as a mask.* And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful. * * * Here we are dealing

with a proper name, which, though it has been used quite generally, is shown to denote the defendant when applied to flash-lights. *The disparity in quality between such wares and anything the plaintiff makes no longer counts, if that be true. The defendant need not permit another to attach to its good will the consequences of trade methods not its own.*"

Yale Electric Corporation v. Robertson, 26 F. 2d 972, 974.

The decision has consistently been cited with approval and followed by this Court, in *Stork Restaurant, Inc. v. Sahati* (hereinafter referred to as the "Stork case") (9th Cir. 1948), 166 F. 2d 348, 354; *Del Monte Special Food Company v. California Packing Corp.* (9th Cir. 1929), 34 F. 2d 774, 775; *Horlick's Malted Milk Corp. v. Horlick's, Inc.* (9th Cir. 1932), 59 F. 2d 13, 15; *Safe-way Stores, Inc. v. Dunnell* (9th Cir. 1949), 172 F. 2d 649, 656; *Fairway Foods, Inc. v. Fairway Markets* (9th Cir. 1955), 227 F. 2d 193, 196. See also to the same effect *Phillips v. The Governor & Co.* (9th Cir. 1935), 79 F. 2d 971, 974; *North American Aircoach Systems, Inc. v. North American Aviation, Inc.* (9th Cir. 1955), 231 F. 2d 205; cert. den. 351 U. S. 920; 100 L. Ed. 599.

In the *Dunnell* case (9th Cir. 1949), 172 F. 2d 649, 655, 656, this Court said in part:

" . . . The situation is that described in *American Steel Foundries v. Robertson*, 269 U. S. 372, 383, 46 S. Ct. 160, 163, 70 L. Ed. 317, 'where a single word in the corporate name has become so identified with the particular corporation that, whenever used, it designates to the mind of the public that particular corporation.'

“ . . . Even though ‘Safeway’ was not appellant’s ‘name’ within the literal language of the old statute, *as we hold it is*, it is plainly appellant’s ‘trade name’ within the express language of the Lanham Act.

* * * * *

“Even assuming the absence of any competition of toilet tissues and Dunnell’s covers for protection of toilet users, *Stores is entitled to its injunction*. The principle is well stated in Judge Learned Hand’s opinion in *Yale Electric Corporation v. Robertson*”

See also as holding competition is not necessary to prevent the use by others of the name “Safeway”: *Safeway Stores, Inc. v. Safeway Opticians, Inc.* (1946), 68 U. S. P. Q. 332; *Safeway Stores, Inc. v. Safeway Const. Co., Inc.* (S. D. Cal. 1947), 74 F. Supp. 455.

The Big Boy and Fairway Cases Do Not Sustain the Decision of the Court Below.

In the *Big Boy* case (9th Cir. 1955), 229 F. 2d 154, 155, the question of competition was not alleged or involved. The complaint averred that plaintiff conducted a drive-in restaurant where he sold double-decker sandwiches under the name “Big Boy”; that the defendant was engaged in manufacturing barbecue equipment under the name “Big Boy Manufacturing Company,” and that the similarity of names led to confusion as to the source of manufacture of defendant’s equipment. The court below dismissed the action. This Court reversed, solely upon the ground that the allegation as to confusion of identity of manufacture entitled the plaintiff to relief if he could prove that averment. If any possible bearing on the question of competition can be found in the decision of this Court, it necessarily implies that competition is not necessary.

The *Fairway* case (9th Cir. 1955), 227 F. 2d 193, presented a situation entirely different from that of the case at bar. There, the plaintiff was engaged in Minnesota and several of the midwest states in the wholesale of food products. Nearly all of its merchandise was wholesaled to retail cooperative stores which it licensed to operate under the name of "Fairway Markets" and "Fairway Foods," all of said stores being in the Midwest or Northwest and none of them in or near California. The defendant opened a super market in Monterey Park, a suburb of Los Angeles, under the name of "Fairway Markets." The action was to enjoin the defendant from using the name "Fairway." The defendant filed a cross-complaint asking that if the plaintiff attempted to do business in California it be enjoined from doing so under its name. The District Court denied the relief sought by the plaintiff and granted that sought by the cross-complaint.

An examination of the opinion of Judge Westover reported in 118 F. Supp. 840, 842, will show that it was based upon the rule established in *Hanover Star Milling Company v. Metcalf* (1916), 240 U. S. 403, 415; 60 L. Ed. 713, 719, which he quoted:

"'. . . In the ordinary case of parties competing under the same mark in the same market, it is correct to say that *prior appropriation settles the question*. But where two parties independently are employing the same mark upon goods of the same class, *but in separate markets* wholly remote the one from the other, the question of prior appropriation is *legally insignificant*; unless, at least, it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, *such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like.*'"

On appeal, this Court affirmed the portion of the decision denying the relief sought by the plaintiff, but reversed the injunction granted on the cross-complaint. Any casual or careful reading of this Court's opinion will show that it not only did not intend to depart from the well recognized rule that there need be no competition between the parties trading in the same area but intended to reaffirm that rule. In part, this Court said at page 196:

“ . . . It is true that unfair trade may result from the dilution of the business good will in ways not connected directly with the possible loss of a sale through deception or confusion, and this phase of unfair trade is well stated in *Yale Electric Corp. v. Robertson*, 2 Cir., 1928, 26 F. 2d 972, at page 974:”

The court then set out the major portion of the opinion in the *Yale* case which we have heretofore quoted, following the quotation with the citation of the *Stork* case (9th Cir. 1948), 166 F. 2d 348, which quoted at length from the *Yale* case and held in no uncertain terms that competition was not necessary.

In the *Stork* case, 166 F. 2d 348, it is stated at page 352:

“In California and elsewhere, a firmly established trade name *receives the same protection from the law as a trade mark.*”

In the *Stork* case this court also held that Sections 14,400, 14,401 and 14,402 of the California Business and Professions Code made a trade name a transferable property right, the invasion of which could be enjoined by any court of competent jurisdiction.

We think it is obvious that this Court quoted with approval from the *Yale* case and cited the *Stork* case for the express purpose of negating any idea that the affirmation of a portion of the judgment contained any indica-

tion of an abandonment or modification of the rule that in the same trading area competition was not necessary. If there can be any doubt of that—and we do not think there can be—it must be dispelled by the later decision of this Court in *North American Aircoach Systems, Inc. v. North American Aviation, Inc.* (9th Cir. 1955), 231 F. 2d 205, 211, where this Court said:

“ . . . Under the authorities, competition is not a condition precedent to the granting of an injunction.”⁶”

Footnote 6 reads as follows:

“*Phillips v. Governor and Company of Adventurers of England Trading into Hudson’s Bay*, 9 Cir., 79 F. 2d 971.”

In the *Phillips* case, this Court, in answer to the contention that the parties were not in competition, said (p. 974):

“ . . . This court, however, has carefully considered the question in *Del Monte Special Food Co. v. California Packing Corporation* (C. C. A.), 34 F. (2d) 774, and has held that the two products need not be competitive. Many authorities are there cited, to which may be added the following:” (Citing some ten decisions.)

Decisions of Other State and Federal Courts.

The decisions of this Court and of the California courts are so conclusive that the citation of decisions by other courts is undoubtedly carrying coals to Newcastle. However, decisions from other courts that competition is not necessary for the reasons stated in the *Yale* case can be cited almost without number.

We would call special attention to the decision of the Kentucky Court of Appeals in *Churchill Downs Distilling Co. v. Churchill Downs, Inc.* (1936), 262 Ky. 567; 90

S. W. 2d 1041 (hereafter referred to as *Churchill Downs* case) which, next to the *Yale* case and the decisions of this Court, above cited, is the most carefully considered opinion we have read upon this subject. We would also call attention to *Aunt Jemima Mills Co. v. Rigney & Co.* (2d Cir. 1917), 247 Fed. 407, 409, 410, 412, and *Tiffany & Co. v. Tiffany Productions, Inc.* (Sup. Ct. 1932), 147 Misc. 679, 682, 683; 264 N. Y. S. 459, 461, 462. Next to the *Yale* case, both of these cases (especially the first) are the most often cited by this and the California courts and the courts of other jurisdictions. Other well considered and often cited Federal and State cases are: *Standard Oil Company of New Mexico v. Standard Oil Company of California* (10th Cir. 1932), 56 F. 2d 973, 978, 979; *Duro Pump & Mfg. Co. v. California Cedar Products Co.* (D. C. Cir. 1926), 11 F. 2d 205, 206; *Hanson v. Triangle Publications* (8th Cir. 1947), 163 F. 2d 74, 78, 79; *Colorado National Company v. Colorado National Bank of Denver* (1934), 95 Colo. 386, 390, 391; 36 P. 2d 454, 455, 456.

California Decisions.

The California decisions are as conclusive as are those of this court. The leading California case undoubtedly is *Academy of Motion Picture Arts and Sciences v. Benson* (1940), 15 Cal. 2d 685; 104 P. 2d 650, hereafter sometimes referred to as *Academy of Motion Picture* case. In that case plaintiff alleged it was a nonprofit corporation organized for conferring awards upon motion picture companies and actors for outstanding achievements. It sought to enjoin the defendant for conducting a school for motion pictures under the name "Hollywood Motion Picture Academy." A demurrer was sustained upon the

grounds that there was no competition between the parties. In reversing the Supreme Court said:

“The decisions of the courts for the most part are concerned with the principles applicable to infringement and unfair competition in respect to businesses which are directly competitive. *But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and the defendant are engaged in non-competing businesses.* In situations involving the use of proper surnames in non-competitive businesses it has been held that where confusion was shown as likely to result the relief should be accorded to the complaining party. (*Tiffany & Co. v. Tiffany Productions*, 237 App. Div. 801 [260 N. Y. Supp. 821] (affd. 262 N. Y. 482 [188 N. E. 30])); *Yale Electric Corp. v. Robertson*, 26 Fed. (2d) 972.) *Likewise it has been said that ‘without regard as to whether there is actual market competition between the parties for the same trade, it is sufficient if the unfair practices of the one will injure the other.’* (63 Cor. Jur., p. 390, and cases cited in note.)”

The foregoing decision has been followed in *Winfield v. Charles* (1946), 77 Cal. App. 2d 64; 175 P. 2d 69; *MacSweeney Enterprises, Inc. v. Tarantino* (1951), 106 Cal. App. 2d 504; 235 P. 2d 266; *Johnson v. Twentieth Century-Fox Film Corp.* (1947), 82 Cal. App. 2d 796; 187 P. 2d 474; *Moffat Company v. Koftinow* (1951), 104 Cal. App. 2d 560; 232 P. 2d 15.

We would call special attention to the opinion of Justice Vallée in *Johnson v. Twentieth Century-Fox Film Corp.* (1947), 82 Cal. App. 2d 796, 818; 187 P. 2d 474, 487, wherein it is pointed out that since the advent of radio and television, titles, slogans and names have become of

great value. In speaking of the *Academy of Motion Picture* case the court stated:

“The reasoning of the later cases is that use by another of the name or title *results in a dilution of its value to the original appropriator*. (*Tiffany & Co. v. Tiffany Production*, 147 Misc. 679 [264 N. Y. S. 459]. * * *)”

The California statutes are equally conclusive. Sections 14400, 14401 and 14402 of the Business and Professions Code read as follows:

“§14400. *Ownership*. Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner.

“§14401. *Transferability: Protection accorded*. Any trade name may be transferred in the same manner as personal property in connection with the good will of the business in which it is used or the part thereof to which it is appurtenant, and the owner is entitled to the same protection by suits at law or in equity.

“§14402. *Remedy for violation of rights*. Any court of competent jurisdiction may restrain, by injunction, any use of trade names in violation of the rights defined in this chapter.”

There can be no doubt that under the law of California an established trade name is a property right and that competition is not necessary to enable the appropriator of the name to enjoin anyone else from using it. Since the jurisdiction of the court below existed only because of diversity of citizenship, the law of California is controlling and the denial by the court below of the injunctive relief sought by the plaintiff was as contrary to the law of California as we have shown it to be to the decisions of this and other Federal Courts.

II.

The Court Was in Error in Holding That It Was Necessary to Show That the Defendant's Use of Plaintiff's Trade Name Had Confused Anyone. Further, the Findings of the Court That There Had Been No Confusion Were Contrary to the Evidence.

In Finding XIII [R. 79] the court found there had been no confusion by reason of the similarity of names, "and there is little likelihood of confusion so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store."

The above finding, in and of itself, requires a reversal of the decree and an injunction in favor of the defendant. The finding, although negatively expressed, is, that there is some possibility, although slight, of confusion. That fact entitles the plaintiff to the relief prayed for even if it be conceded that the finding is correct that up to time of trial there has been no confusion.

In *MacSweeney Enterprises, Inc. v. Tarantino* (1951), 106 Cal. App. 2d 504, 512; 235 P. 2d 266, 271, the court said:

"Appellants next argue that no one could have been deceived by the challenged label. Anyone, so it is stated, of reasonable intelligence would know that the cocktail sauce was manufactured and marketed by the Bell company, and not by respondent. This, however, was a question of fact. *Proof of actual confusion is not necessary*. If the facts support the conclusion that a purchaser of ordinary intelligence could reasonably be confused, that is all that is required. (*American Distilling Co. v. Bellows & Co.*, 102 Cal. App. 2d 8 [226 P. 2d 751].) That is this case."

See, to the same effect: *National Van Lines, Inc. v. Dean*, 237 F. 2d 688, 691, decided by this Court October 18, 1956, and the California decisions therein cited and quoted; *Winfield v. Charles*, *supra* (1946), 77 Cal. App. 2d 64, 70; 175 P. 2d 69, 73; *Del Monte Special Food Company v. California Packing Corp.*, *supra* (9th Cir. 1929), 34 F. 2d 774, 777; *Sun-Maid Raisin Growers of California v. Mosesian* (1927), 84 Cal. App. 485, 497-498; 258 Pac. 630, 635.

In the first case cited, *National Van Lines, Inc. v. Dean*, *supra*, this Court held that where there is a similarity in sound or appearance of a trade name or emblem it must be held as a matter of law that confusion is liable to result, and that a finding of a trial court to the contrary must be disregarded.

It cannot be controverted that it is apt to cause confusion if the defendant is permitted to use the word "Safeway" in his trade name and to advertise his goods under the name of "Safeway" by using only that word, as he did once, and in other advertisements making it the most conspicuous portion of his name. Further, as before pointed out, if the defendant can use the word "Safeway" and advertise it as he has, any other retailer not selling vegetables and meats can do the same. It is self-apparent that such use by a large number of retailers would cause confusion. It is even more apparent that such use by a large number of retailers not engaged strictly in the sale of foods would cause the loss of identity in the secondary meaning of the words "Safeway" as indicating the plaintiff and the merchandise it sells. *It is certain that it would greatly dilute, if not destroy, the good will value which the plaintiff has created in its trade name.*

Also, to predicate denial of injunctive relief to plaintiff upon the foregoing finding would unduly limit the plaintiff's right to expand its business. Since the court's find-

ing or conclusion that at present there was only a slight possibility of confusion is predicated upon plaintiff "continuing to operate retail food and grocery markets and defendant continuing to operate a retail furniture store." There would be certainty of confusion if the plaintiff increased, as it well might do, the lines of household furniture it sells and the defendant added to his merchandise, as he well might do, the same or similar lines of furniture or household equipment as the plaintiff sold.

In *National Van Lines, Inc. v. Dean*, *supra*, this Court, quoting and citing from *MacSweeney Enterprises, Inc. v. Tarantino*, *supra*, said:

"Unfair competition is proscribed by statute in California, and may be enjoined. The deceptive use of a similar name, or the emblematic representation of such name by a competitor, is unfair competition. It is not necessary to prove fraud, since the California statute, as amended in 1933, refers to 'unfair or fraudulent business practice.' (Emphasis supplied.)

"Nor is it necessary to prove that any person has been confused or deceived; it is sufficient that there is a likelihood of deception."

From the remarks of the court below during argument, we are certain that it was the court's opinion that before he could grant plaintiff any relief there must be some direct evidence of confusion resulting from the use by defendant of the word "Safeway." These remarks are not in the record, but we believe the Memorandum of Opinion discloses that the court held that view:

" . . . There is no evidence in this case that there has been any confusion between the two stores, as no one testified they went into defendant's store thinking it was plaintiff's or vice versa; and there has

been no evidence that defendant at any time attempted to 'palm off' any of his merchandise as being that of plaintiff." [R. 56.]

In the situation of the instant case confusion at the customer level would be almost impossible to show. Very few, if any, customers going into plaintiff's self-service stores would be apt to mention the defendant's store and it would be difficult if not impossible to show that any of defendant's customers had initially gone to its store because of being misled by its name or advertisements, although undoubtedly a number of them had been.

The remarks of the Second Circuit in *Miles Shoes, Inc. v. R. H. Macy & Co., Inc.* (1952), 199 F. 2d 602, 603; cert. den. 345 U. S. 909; 97 L. Ed. 1345, in reversing the decree of the District Court directing the Commissioner of Patents to register a confusingly similar trade mark as to hosiery, are pertinent:

"Moreover, since reliable evidence of actual instances of confusion is practically almost impossible to secure, *particularly at the retail level*, in the final analysis the decision must rest on the court's conviction as to possible confusion."

In *Gehl v. Hebe Co.* (7th Cir. 1921), 276 Fed. 271, 272-273, the court said:

" . . . The general form and sound of the words, having marked similarity, would strongly suggest the likelihood of confusion. Although there was here no evidence of actual confusion on the part of customers, this is not easily available, *nor indeed necessary* where the words themselves suggest it."

See, also, to the same effect: *Cozier v. Economy Cash Stores, Inc.* (1951), 71 Ida. 178, 190; 228 P. 2d 436, 443.

It cannot be said that the defendant's advertisements were not such as to be apt to lead the casual reader to believe that the defendant's store was a branch of or sponsored by plaintiff. Conceding the average person who went to defendant's store under such belief would be disillusioned on his entering the store, being there he would probably make purchases. *It is perfectly obvious that the defendant's advertisements were for the purpose of producing exactly this result, thus allowing him to profit from the good will which the plaintiff has created in the name "Safeway."*

It is settled that the fact plaintiff has not been damaged or lost any sales is immaterial; that in equity and good conscience one may not trade upon the good will that another has built up, even though that other is not damaged.

In the *Stork* case, *supra*, 166 F. 2d 348, 357, this Court said:

"(a) '*Reaping Where One Has Not Sown.*'"

The decisions frequently refer to this sort of imitation as '*reaping where one has not sown*' or as '*riding the coattails*' of a senior appropriator of a trade name.

By whatever name it is called, equity frowns upon such business methods, and in proper cases will grant an injunction to the *rightful user of the trade name.*"

To the same effect see: *Del Monte Special Food Co. v. Californina Packing Corporation* (9th Cir. 1929), 34 F. 2d 774, 775; *Yale Electric Corporation v. Robertson* (2d Cir. 1928), 26 F. 2d 972, 973; *Churchill Downs Distilling Co. v. Churchill Downs, Inc., supra* (1936), 262 Ky. 567, 572; 90 S. W. 2d 1041, 1043; *Hanson v. Triangle Publications* (8th Cir. 1947), 163 F. 2d 74, 78; *Colorado National Company v. Colorado National Bank of Denver* (1934), 95 Colo. 386, 391; 36 P. 2d 454, 456; *Tiffany & Co. v. Tiffany Productions, Inc.* (Sup. Ct. 1932), 147 Misc. 679, 681; 264 N. Y. S. 459, 461.

In the *Del Monte* case, *supra*, 34 F. 2d 774, 775, it is said:

“ . . . Thus every effort made by the appellee to increase the volume and variety of its products and maintain its high standard of quality by its systematic and expensive advertising campaign and by care in the preparation of its products redound to the benefit of the appellant, which does not contribute in any manner to the expenditures involved in this vast undertaking, and whose only motive for the adoption of the same ‘brand’ is to get the advantage of appellee’s name, reputation, and good will.”

In the *Churchill Downs* case, *supra* (1936), 262 Ky. 567, 573; 90 S. W. 2d 1041, 1044, it is said:

“The right of Churchill Downs, Inc., to the exclusive use of the name ‘Churchill Downs’ is property in a qualified sense (*Stratton & Terstegge Co. v. Stiglitz Furnace Co.*, 258 Ky. 678, 81 S. W. (2d) 1), which equity by injunctive relief will protect from another’s intentional use for the purpose of

deriving a profit from its reputation, without proof of special damages. Armstrong v. Kleinhans, 1 Ky. Law. Rep. 112."

As we have seen, the above equity rule has been embodied in the California Business and Professions Code in Sections 14,400, 14,401 and 14,402.

Further argument of the subject is unnecessary in view of the clarity of the decisions of California (which are controlling) and of this and all other courts of which we are aware that it is not necessary to show any confusion.

In *Sun-Maid Raisin Growers of California v. Mosesian* (1927), 84 Cal. App. 485, 497-498; 258 Pac. 630, 635, the court said:

"And in the case of *T. A. Vulcan v. Myers*, 139 N. Y. 364 (34 N. E. 904), it is said: '*No evidence was given or offered (in this case) to show that any person had actually been deceived by the limitation of the plaintiff's trade-mark, and we think that none was necessary for the maintenance of the action. It is the liability to deception which the remedy may be invoked to prevent. It is sufficient if injury to the plaintiff's business is threatened, or imminent to authorize the court to intervene to prevent its occurrence. The owner is not required to wait until the wrongful use of his trade-mark has been continued for such a length of time as to cause some substantial pecuniary loss.*'"

To the same effect, *Winfield v. Charles, supra* (1946), 77 Cal. App. 2d 64, 70; 175 P. 2d 69, 73; *Pastificio Spiga Societa Per Azioni v. De Martini Macaroni Co.,*

Inc. (2d Cir. 1952), 200 F. 2d 325, 327; *Miles Shoes, Inc. v. R. H. Macy & Co., Inc.*, *supra* (2d Cir. 1952), 199 F. 2d 602, 603; cert. den. 345 U. S. 909; 97 L. Ed. 1345; *LaTouraine Coffee Co., Inc. v. Lorraine Coffee Co., Inc.* (2d Cir. 1946), 157 F. 2d 115, 117; cert. den. 329 U. S. 771; 91 L. Ed. 663; *Admiral Corp. v. Penco, Inc.* (2d Cir. 1953), 203 F. 2d 517, 520; *Churchill Downs Distilling Co. v. Churchill Downs, Inc.*, *supra* (1936), 262 Ky. 567, 571; 90 S. W. 2d 1041, 1043; *Hanson v. Triangle Publications, Inc.* (8th Cir. 1947), 163 F. 2d 74, 79-80; *Bissell Chilled Plow Works v. T. M. Bissel Plow Co.* (W. D. Mich. 1902), 121 Fed. 357, 366; *William R. Warner & Company v. Eli Lilly & Company* (1924), 256 U. S. 526, 530; 68 L. Ed. 1161, 1164; *Florence Mfg. Co. v. J. C. Dowd & Co.* (2d Cir. 1910), 178 Fed. 73, 75; *Ohio Baking Co. v. National Biscuit Co.* (6th Cir. 1904), 127 Fed. 116, 120.

In the *Stork* case, *supra*, 166 F. 2d 348, 359, it is said:

“The appellees stress the fact that the appellant has failed to show ‘that appellees’ operation in any way has injured appellant’, etc.

“Neither under the California jurisprudence nor under the general law is such showing necessary. *The California decisions, indeed are overwhelmingly in accord on this point.*”

III.

The Court Erred in Not Granting Plaintiff Injunctive Relief as to the Improper Advertising of Defendant's Business as "Safeway" and Erred in Its Finding That the Defendant's Improper Advertising Was Not for the Purpose of Trading Upon Plaintiff's Good Will and Was Not Calculated to Deceive, and Erred in Preventing Plaintiff From Introducing Evidence as to the Damaging Misleading and Deceptive Character of the Advertising.

The court in Findings X, XI and XII [R. 78-79], in effect found there was no similarity between the advertisements of the plaintiff and those of the defendant. These findings are directly contrary to the advertisements themselves. The defendant's advertisement in the Van Nuys News of November 16, 1952, reads:

"SAFEWAY is open SUNDAYS 11 A.M. to 5 P.M. Save on Sunday 6416 Van Nuys Blvd. STate 0-4371." [Ex. "M" of the Requests for Admissions Folder.]

There is no other exhibit showing the use of the word "Safeway" only, but an examination of the various other advertisements will show that "Safeway" is always the dominant feature of the advertisement, being always in larger and more conspicuous letters than either "Furniture" or "Furniture Company." The predominance of the word "Safeway" varies in the advertisements, but all are of a character to show that the defendant was attempting to advertise his business under plaintiff's trade name.

It is unnecessary and would unduly prolong this brief to comment on the various advertisements. They speak

for themselves. But we would call attention especially to Exhibits 1, 2 and 3. Exhibit 1 consists of two advertisements of September 3, 1951, each a full page, the first of the defendant and the second of the plaintiff; Exhibit 2, two similar advertisements of July 22, 1954, of a page each of the plaintiff and defendant; and Exhibit 3, a page advertisement of August 4, 1954 of the defendant.

An examination of Exhibit 1 will show that defendant's advertisement of "Safeway" was in exactly the same block letters as that of the plaintiff only larger, and although "Furniture Company" appeared below it in very small letters and would not be noticed without careful reading. The same is true of Exhibits 2 and 3, although "Safeway" is in slightly smaller letters than in Exhibit 1.

Assuming, contrary to what we have demonstrated, that the defendant had a right to include "Safeway" in the fictitious name under which he did business, he did not have the right to advertise his business under that name alone or to make it the most dominant part of his advertisement. "Safeway" was shown by the evidence and found by the court to be the defendant's trade name. It was held in the *Stork* case, *supra*, 166 F. 2d 348, 352, that under the Statutes of California a trade name is entitled to the same protection as a trade mark.

Even if the defendant were entitled to use "Safeway" in the fictitious name under which he did business merely because he was not selling the same line of furniture as that handled by the plaintiff, it is certain he did not have a right to use or advertise "Safeway" as the name of his store. That he was doing so to trade upon the good will of Safeway, and especially the good will that it might develop by its advertisements for the articles of household equipment it sold, is so obvious that Findings

X, XI and XII must be disregarded as unsupported by and contrary to the evidence.

In its prayer for relief, plaintiff sought to enjoin the defendant from the improper use and improper advertisement of the word "Safeway." The court, at the conclusion of plaintiff's evidence, clearly stated he had no power to grant such relief.

We quote the colloquy between court and counsel on this subject:

"Mr. Magid: The plaintiff is asking for a permanent injunction.

"The Court: For the use of the word Safeway.

"Mr. Magid: No, and in the alternative, page 14, line 32, he is asking for an alternate injunction against using any name Safeway in such a way or manner as to imitate the word Safeway.

"The Court: It has nothing to do with the case. I am not going to tell you how he can dictate to the newspaper what type they are going to use, whether dark space, light space, or not.

"Mr. Magid: That is what the plaintiff is asking for.

"The Court: I can't do that." [R. 208-209.]

Nothing could be more erroneous. If anything is settled, it is that one cannot use a name that is common property and which any one may use in such a way and manner as to imitate a trade mark or trade name of another or to indicate that his goods are those of another.

The decisions in *Singer Manufacturing Company v. June Manufacturing Company* (1896), 163 U. S. 169, 186, 204; 41 L. Ed. 118, 125, 131, and *Singer Manufacturing Company v. Bent* (1896), 163 U. S. 204, 206; 41 L. Ed. 131, 132, hereafter referred to as "the Singer

Sewing Machine cases” should be sufficient. In each of those cases the Supreme Court held that when the patent on the Singer Sewing Machine expired “Singer” became a generic term indicating a sewing machine of the character made under the patent. But that fact did not give persons other than the Sewing Machine Company the right to imitate the use by the plaintiff company of the word “Singer” or to use it in such a way that a purchaser might be led to believe the Singer Sewing Machine he was purchasing was manufactured by the Singer Sewing Machine Company.

Although very early decisions, they have never been departed from but have been consistently followed.

Authorities can be cited almost without limit that a name or word which is incapable of exclusive appropriation or which has become common property and which anyone can use, including a party’s own name, cannot be used in a manner that would imitate the use of the same name or word by a former user or appropriator thereof. See: *Jackman v. Mau* (1947), 78 Cal. App. 2d 234, 242; 177 P. 2d 599, 604; *MacSweeney Enterprises, Inc. v. Tarantino* (1951), 106 Cal. App. 2d 504; 235 P. 2d 266; *McLean v. Fleming* (1878), 96 U. S. 245; 24 L. Ed. 828; *L. E. Waterman Co. v. Modern Pen Co.* (1914), 235 U. S. 88; 59 L. Ed. 142; *Horlick’s Malted Milk Corporation v. Horlick’s, Inc.* (9th Cir. 1932), 59 F. 2d 13; *La Republique Francaise v. Saratoga Vichy Springs Co.* (2d Cir. 1901), 107 Fed. 459, 462; aff’d 191 U. S. 427, 440; 48 L. Ed. 247, 254 (hereafter sometimes referred to as the “Vichy case”); *Saxlehner v. Eisner & Mendelson Company* (1900), 179 U. S. 19, 40, 41; 45 L. Ed. 60, 76, 77; *Sunbeam Lighting Co. v. Sunbeam Corporation* (9th Cir. 1950), 183 F. 2d 969, 971, 972, and *Sunbeam Furniture Corporation v. Sunbeam Corporation* (9th Cir. 1951), 191 F. 2d 141, 144, hereafter referred to as “the

Sunbeam cases"; *Mershon Company v. Pachmayr* (9th Cir. 1955), 220 F. 2d 879, 883.

In the first case cited, where the trade name of the plaintiff was "Jackman" and the defendant's name was "Jack Mau," the court said:

" . . . Equity will not countenance the use by respondent of the trade name 'Jackmau,' *written in script form and similar to the manner in which appellants' long possessed trade name is written* because respondent may thereby reasonably confuse and deceive the buying public into the belief that his is a 'Jackman' retail store."

Jackman v. Mau, 78 Cal. App. 2d 234, 242; 177 P. 2d 599, 604.

In *La Republique Francaise v. Saratoga Vichy Springs Co.*, *supra* (2d Cir. 1901), 107 Fed. 459, the plaintiff, as the original adopter of the word "Vichy," sought to enjoin the use of it by the defendants. The plaintiff's water was bottled in France from springs near Vichy, the defendant's in New York from springs near Saratoga. The defendant had adopted a label on which the name "Vichy" was printed in very conspicuous type underneath "Saratoga" in less conspicuous type. It was held by the Second Circuit that "Vichy" had become common property and that anyone could use it, but that the defendant should be enjoined from printing the word "Vichy" in any larger or different type than the word "Saratoga." While the decision of the Circuit Court as to the right of the defendant to use "Vichy" was reviewed by the Supreme Court and affirmed (191 U. S. 426; 48 L. Ed. 247), the defendant did not seek a review of the injunction against it requiring it to print the word "Saratoga" in as large and the same type as "Vichy."

In the *Sunbeam* cases (183 F. 2d 969, 971; 191 F. 2d 141, 144), this Court held that Sunbeam was a descrip-

tive word not capable of being exclusively appropriated either as a trade name or trade mark; hence the plaintiff could not enjoin the defendant from using the word "Sunbeam" in its corporate name but could enjoin it from using the word "Sunbeam" and "Master" upon lamps which it made. Also, that the defendant could be enjoined from using the word "Sunbeam" in script similar to that of the plaintiff, saying in the first case:

"We recognize that a non-fanciful word may be used by one business enterprise as its trade-mark and as its trade-name in circumstances where its unqualified use by another may constitute infringement or unfair trade. Such principle comes into play in this case *as against defendants in their use of the script form of the word Sunbeam and in the combination of the words Sunbeam and Master.*"

Sunbeam Lighting Co. v. Sunbeam Corporation,
183 F. 2d 969, 971-972.

It is certain that the court was in error in holding that if the defendant had a right to include "Safeway" in its fictitious name he could not be enjoined from the improper advertisement of that word.

THE COURT ERRED IN FINDINGS IX AND X TO THE EFFECT THAT DEFENDANT'S ADVERTISEMENTS WERE NOT FOR THE PURPOSE OF TRADING UPON THE GOOD WILL PLAINTIFF HAD CREATED FOR SAFEWAY AND ERRED IN DECLINING TO PERMIT DEFENDANT TO BE EXAMINED ON THE SUBJECT BY PLAINTIFF.

As heretofore stated, the Court found in Findings IX and X [R. 77-78] that the defendant's use of the word "Safeway" in its advertisements was not for the purpose of trading upon plaintiff's good will, and in Finding XI that the word "Safeway" was not given undue promi-

nence in the advertising and that said advertisements were not for the purpose of “trading upon the name, reputation and standing of the plaintiff.” [R. 78-79.]

There is absolutely no evidence in the record to sustain the above findings. The defendant was examined on that subject by his counsel, and the questions asked him, to which he gave a negative answer, were:

“Q. (By Mr. Magid): Have you used the name Safeway Furniture for the *sole* purpose of trading upon the good will of the plaintiff in this case?

* * * * *

“Q. (By Mr. Magid): Have you ever used the name Safeway Furniture Store or Safeway Furniture Company for the *sole* purpose of trading upon the good will of the plaintiff, Safeway Stores?” [R. 206.]

There is no other testimony in the record that would even suggest the correctness of the above Findings. Certainly, the fact that defendant did not adopt the name “Safeway” or make it the most prominent of his advertising for the *sole* purpose of trading upon plaintiff’s good name is not sufficient. If that was one of his objects it was improper.

Even if the questions had been differently framed and defendant had said that trading on the good will plaintiff had developed for Safeway was not an object at all, his testimony would have to be disregarded. His actions speak louder than words. If he did not have the idea of capitalizing on the good will attaching to “Safeway,” *why did he make it the most dominant part of his advertisements?*

We Shall Await Defendant's Reply With Interest.

The observations of the Second Circuit in *Miles Shoes, Inc. v. R. H. Macy & Co., Inc.*, *supra* (1952), 199 F. 2d 602, 603; cert. den. 345 U. S. 909; 97 L. Ed. 1345, are most pertinent:

“Miles sought registration of its trade mark in 1945 when it had only been using it for about three months. Why it should have chosen a mark that had long been employed by Macy and had become known to the trade instead of adopting some other means to identify its goods is hard to see *unless there was a deliberate purpose to obtain some advantage from the trade which Macy had built up*. It seems unlikely that Miles would have suffered any loss if it had avoided the use of a confusing symbol and we believe that it should employ some fairer means for designating its product. *Even though the decision below purports to uphold defendant Macy's trade mark, it permits competition from one so much like it as effectually to destroy any vitality to the Macy mark.*”

However, the court below committed the most obvious and flagrant error in refusing to allow plaintiff to examine the defendant upon his reason for using “Safeway.” Plaintiff, as part of its case, called the defendant under the provisions of Rule 43(b), and after he testified that he had not known that plaintiff's name was other than “Safeway,” plaintiff attempted to examine him as follows:

“Q. You knew, didn't you, that they had built up a very high and valuable good will under that name?”

“Mr. Magid: If your Honor please, I think we are definitely getting into the realm of argument.

“The Court: Make your objection.

“Mr. Magid: I object to the question on the ground it is argumentative.

"The Court: Objection sustained. I will take judicial knowledge, Mr. Sterry, that Safeway has built up a valuable asset of good will in this community, extending back over the years 1952, 1953, and before.

"Mr. Sterry: I understand, but I still think we have a right to show he knew that. One of our charges is that he adopted this name just for the purpose of trading on it.

"The Court: He didn't adopt the name, Mr. Sterry. The name was there. He bought it.

"Mr. Sterry: Well, all right, even if he bought it, under the decisions, that is enough.

"The Court: He didn't adopt the name. * * *"
[R. 188.]

We are unable to conceive of any justification for the court's ruling. The court apparently thought that because defendant purchased an interest in a store that was already using plaintiff's trade name he had a right to continue the use of that name.

As we have seen, the decisions of this and the California courts are unanimous in holding that the California statutes make a trade name a property right. True, it is an intangible right, but the right of protection and transfer are the same as to intangible as they are to tangible property.

We apprehend that if the suit had been to recover tangible property belonging to plaintiff in defendant's possession it would be no defense that defendant had bought it from someone who had illegally taken it from the plaintiff.

The court's ruling cut off the plaintiff from any possible cross-examination of defendant on that very important subject and was obviously erroneous.

The foregoing observations apply equally to the balance of Finding IX wherein the Court found that the plaintiff did not continue the use of Safeway for the purpose of trading upon the good will that plaintiff had developed for that name, but because it would entail considerable expense to change the neon and electric light signs, stationery, etc. [R. 77-78]. The Court does not conclude that those facts would justify the unlawful use of plaintiff's trade name, but the Court must have thought they were of some importance to have incorporated them in its findings. Clearly, one is not justified in either adopting or continuing the use of another's trade name because it will be expensive to discontinue such wrongful trespass upon the right of another. As a matter of fact, the removal of defendant's neon sign "Safeway" and the changes of stationery would have cost far less than the defense of this suit.

THE COURT ERRED IN SUSTAINING THE OBJECTION OF THE DEFENDANT TO PLAINTIFF'S ATTEMPT TO SHOW THE CONFUSING NATURE OF DEFENDANT'S ADVERTISING.

Finding XII reads [R. 79]:

"It is not true, as alleged in Paragraph XXXII that the defendants' use of the name Safeway Furniture Co. caused or will cause the public to believe that the standards of plaintiff's business conduct and the quality of plaintiff's goods or services have fallen or will fall through any act of the defendant."

The record shows that the plaintiff endeavored to prove by Mr. Bauer, President of the Better Business Bureau, and Mr. White, Secretary-Manager of the Southern California Retail Grocers Association, that the defendant's advertising, especially as shown by Exhibits 1, 2 and 3, would be damaging to the plaintiff in this: that if the defendant were allowed to continue to advertise his store

and merchandise as "Safeway," customers or prospective customers were liable to refer to transactions in defendant's store as having occurred in "Safeway," and any disparaging remarks about Safeway would be detrimental to plaintiff [R. 95-97, 169-170]. On defendant's objection, the court refused to permit the evidence [R. 95, 97, 169-170].

We think it is obvious that either Finding XII of the court was erroneous and unsupported by the evidence or that the court was in error in rejecting plaintiff's proffered evidence. Actually, the court was in error both in its finding and its rejection of the proffered evidence.

Of course, the advertisements spoke for themselves in the sense that one could look at them and see what they advertised. There can be no controversy that in defendant's advertisements, especially in the advertisements shown in Exhibit 1, "Safeway" was the dominant word. If the defendant could so advertise, necessarily any other retailer could do likewise. If the defendant's business and that of other retail merchants became known as "Safeway," it seems to us obvious that any adverse comments as to the business or dealings of any merchant doing business under the name of Safeway must necessarily redound to the discredit of the plaintiff. Perhaps that is another way of stating the principle announced in the *Yale* case, that if a newcomer were permitted to use a well-known trade name he could easily tarnish it.

One thing is quite certain: If it cannot be said as a matter of law that the defendant's advertisements would damage the plaintiff, then the plaintiff had a right to introduce proof showing how and in what manner defendant's advertisements would damage it. If it can be said as a matter of law,—as we think it can and must be,—that the necessary effect of defendant's advertising would damage the plaintiff, then obviously Finding XII is without evidentiary support and erroneous.

IV.

The Use by Others of the Name "Safeway" Did Not Justify the Court in Denying Plaintiff the Relief Which It Sought or in Concluding That the Protection of Plaintiff's Trade Name Is Limited to Retail Merchants Selling Articles Usually Found in Grocery Stores or Food Markets.

As heretofore stated, the only two serious defenses relied on in the court below were the lack of competition and the use of "Safeway" by others. Although, the court made no formal finding or conclusion thereon, it intimated in its opinion, which, by conclusion X [R. 81], is purported to be made a part of the Findings of Fact and Conclusions of Law, that the use by others of the name "Safeway" was the basis for the court's conclusion as to the limitation of its protection. In its opinion the court said:

"In the case at bar the Court is of the opinion plaintiff is entitled to protection of its name 'Safeway' within the retail food and grocery industry in Southern California. The only question is whether defendant Safeway Furniture Co., Inc., comes within the area of protection. Although plaintiff and its predecessors have been using the name 'Safeway' since 1925, nevertheless, over the years the name has been used many, many times in other businesses. In 1925 there was a 'Safeway Cleaners and Dyers,' in 1926 a 'Safeway Auto Finance Co.' and a 'Safeway Loan Company.' Since 1925 there have been approximately ninety-six listings with the County Clerk of Los Angeles County of fictitious or corporate names in which the name 'Safeway' appears. An examination of the June, 1956, Central Directory of the Los Angeles Telephone Exchange indicates twenty firms now using the word 'Safeway' in their titles." [R. 58-59.]

It will be noted that apparently none of the concerns mentioned by the court as using "Safeway" were in the retail business as that term is usually understood.

While the defendant stipulated as to the number of filings during the past thirty-one years with the County Clerk of fictitious or corporate names in which "Safeway" appeared such stipulation was subject to the admissibility of the facts stipulated to. The court overruled the plaintiff's objection to the introduction of the stipulation,—we think improperly. The mere fact that a certificate of a fictitious name is filed with the County Clerk is no evidence that the name was ever actually used, or of the character of business carried on by the persons using such fictitious name, or the use made of any part of the fictitious names. No evidence as to these facts was offered by the defendant and the record is absolutely silent whether any of the persons filing certificates of fictitious or corporate names containing "Safeway" ever did any business, or the character of business they did.

The evidence was uncontradicted that the use by others of the name "Safeway" had not made any public impression or diluted in any degree the secondary meaning of "Safeway" as being the plaintiff, its chain of stores and the merchandise sold in the stores.

Mr. Bauer, President of the Better Business Bureau, testified:

"Q. Do you know of your own knowledge, confining it to this vicinity, Los Angeles County, whether the plaintiff, Stores, Incorporated, has used any one word or insignia as advertising? A. I know for many years their signature on their advertising has been just simply Safeway.

* * * * *

“Q. In all your business or transactions, have you ever known of any other concern than the plaintiff that has been known by that single word, Safeway? A. Not that I recall, although I know the name Safeway has been used in a few instances, but I know none *where it has been used by a retail store here.*

“Q. *In all your experience, do you know of any other concern that has attempted to advertise as Safeway?* A. No.” [R. 91-92.]

Mr. Sample, the Vice-President of the Better Business Bureau, and Mr. Carothers, President of the Food Employers Council, Incorporated, both testified to the same effect [R. 103-104, 173], Mr. Carothers stating that the only recollection he had of any other person using “Safeway” was that he had seen it once upon a van [R. 173].

Mr. White, Secretary and Manager of the Southern California Retail Grocers Association testified:

“Q. Now, Mr. White, either now or during any of the time that you have been secretary of this association, have you ever heard or known yourself of any other persons or concerns, by that I mean corporations or partnerships, doing business under the name of Safeway, other than the plaintiff? A. To the best of my knowledge, I believe not, sir, until this matter was brought to my attention.

“Q. If there has been, it has been so slight it didn’t register with you? A. *That is correct.*” [R. 169.]

There was not a syllable of testimony to contradict the foregoing. Mr. Heller, the former manager of the Los Angeles Division from 1949, testified that he was

not conscious of the use of the word "Safeway" by others except in one instance in San Diego and one or two others that he had reported to the Legal Department [R. 119-120].

It is too well settled by the decisions of this and all other courts that the mere use by others of a trade name is no defense to an action of this character that further argument is unnecessary.

In the *Dunnell* case, *supra* (9th Cir. 1949), 172 F. 2d 649, 654, this court said:

" 'Safeway' is a coined word not appearing in the dictionary. *That others may have used it does not prevent its acquiring a secondary meaning, . . .*"

In the *Del Monte* case, *supra* (9th Cir. 1929), 34 F. 2d 774, 777, this Court said:

"The appellant relies on the use of the name 'Del Monte' by others upon products sold in grocery stores, such as 'Del Monte flour,' 'Del Monte flake biscuits,' one of a number of varieties of biscuits manufactured by Standard Biscuit Company of San Francisco, 'Del Monte Creamery,' dealing in milk, butter, eggs, and cheese, and 'Del Monte Coffee.' It is sufficient with reference to such use of the name 'Del Monte' upon food products by others to say that, whatever may be the respective rights of the appellee and these other users of the name 'Del Monte,' *such use does not justify the appellant in its more recent use of appellee's well-known mark upon a new and different product recently produced by it; for, as has been stated, the question involved here is not the infringement of a trade-mark in which the prior use by others would be material, but is that of the adoption by the appellant of unfair*

the appellee, notwithstanding the use of the brand by others, even if such use by others preceded the use by appellee."

Cases from other jurisdictions *ad infinitum* might be cited. The most carefully and best reasoned of those decisions is the *Churchill Downs* case, *supra* (1936), 262 Ky. 567, 575; 90 S. W. 2d 1041, 1045. In that case the plaintiff and its predecessors in interest for a great number of years had been operating a race track, and the name "Churchill Downs" had acquired a secondary meaning as indicating the plaintiff. The action was to restrain the defendant (appellant) from using the name "Churchill Downs" in the manufacture and sale of bourbon whiskey. While the defendant (appellant) in that case relied, as does the defendant here, on the fact that there was no competition between the parties, it also relied equally upon the use of "Churchill Downs" by a large number of other persons and firms. In rejecting that defense and affirming the judgment of the court below enjoining the defendant from using "Churchill Downs," the court said in part:

" . . . Its evidence establishes that the name 'Churchill Downs' has been used by persons and companies other than Churchill Downs, Inc., in an entirely different business from that of Churchill Downs Distilling Company and of Churchill Downs, Inc.; that Levy Brothers engaged in business at Third and Market streets, Louisville, Ky., advertised and sold 'Churchill Downs' hats; 'Churchill Downs Post' No. 2921, at Fourth and 'M' streets, Louisville, Ky., sold tickets for a 'Bingo'; the General Tobacco Company registered with the United States

Patent Office in 1922, the name 'Churchill Downs' for cigars, smoking tobacco and leaf tobacco; Levy Brothers registered with the United States Patent Office the name 'Churchill Downs' for women's, men's and children's hats and caps; Abercrombie & Fitch Company, Forty-Fifth and Madison streets, New York City, registered with the United States Patent Office the name 'Churchill Downs' for walking-stick seats, canes, parasols, and umbrellas; and it is clearly established that the public had not been induced to buy the goods of the Churchill Downs Distilling Company under the belief they were manufactured by Churchill Downs, Inc.

"The use of the name 'Churchill Downs' by other persons or corporations is no shielding defense to the distilling company's use of it."

With how much greater reason can it be said in the instant case that the inclusion of the name "Safeway" in the corporate or fictitious name of other concerns than retailers (with the possible exception of one or two very insignificant stores) does not give the defendant the right to conduct a retail establishment under plaintiff's trade name of "Safeway," and especially does not permit him to advertise his merchandise under plaintiff's trade name.

If further authority is necessary, see: *Actiengesellschaft Vereinigte Ultramarin-Fabriken v. Amberg* (3rd Cir. 1901), 109 Fed. 151, 152; *Ward Baking Co. v. Potter-Wrightington, Inc.* (3rd Cir. 1924), 298 Fed. 398, 404; *Ford Motor Co. v. Ford Insecticide Corporation* (E. D. Mich. 1947), 69 F. Supp. 935, 937; *New*

York World's Fair 1939, Inc. v. World's Fair News, Inc. (Sup. Ct. 1937), 163 Misc. 661, 666; 297 N. Y. Supp. 923, 929; *National Picture Theatres, Inc. v. Foundation Film Corporation* (2d Cir. 1920), 266 Fed. 208, 211; *State ex rel. Cohen v. Hinkle* (1926), 139 Wash. 651, 653; 247 Pac. 1029, 1030; *Thomas A. Edison, Inc. v. Shotkin* (D. Colo. 1946), 69 F. Supp. 176, 179; App. dismissed 163 F. 2d 1020; *Acme Chemical Co. v. Dobkin* (W. D. Pa. 1946), 68 F. Supp. 601, 613.

In the last case cited the court said:

“Counsel has brought to the Court’s attention a long list of corporations which appear in the Pittsburgh Telephone Directory which have the word ‘Acme’ in their corporate names. The list could doubtless be definitely lengthened if consideration is given to the companies doing business with the word ‘Acme’ in their names in Western Pennsylvania generally, which comprises twenty-four counties. *However, if a wrong has been done to the plaintiff in this action, it cannot be redressed or condoned by wrongs done by others.*”

In *Thomas A. Edison, Inc. v. Shotkin, supra* (D. Colo. 1946), 69 F. Supp. 176, 179, the court said:

“ . . . The plaintiff should in justice be permitted to select those places where it stood to suffer the greater damage *in lieu of making a mass attack upon all offenders at an enormous expense.*”

IN ANY AND ALL EVENTS, THE PLAINTIFF WAS ENTITLED TO THE EXCLUSIVE USE OF ITS TRADE NAME IN THE RETAIL FIELD, AND THE USE OF "SAFEWAY" BY NON-RETAILERS WOULD NOT JUSTIFY THE COURT IN PERMITTING ANOTHER RETAILER TO CARRY ON HIS BUSINESS AND ADVERTISE HIS MERCHANDISE UNDER THE PLAINTIFF'S TRADE NAME "SAFEWAY."

In its Memorandum Opinion the court stated:

"It was plaintiff's original contention that it had the exclusive right to the use of the name 'Safeway.' . . . In its brief plaintiff now contends it can prevent any other retail establishment from using the word 'Safeway,' even though such establishment is not in direct competition with plaintiff.

"The problem thus presented to the Court is rather simple—Can the plaintiff monopolize the word 'Safeway' in relation to retail trade in Southern California in the absence of competition?" [R. 56.]

The foregoing seems to imply that the plaintiff changed its position at the trial. Of course, it did nothing of the kind. If the court so interpreted our brief it entirely misinterpreted it.

At the outset of the trial the court had commented upon the alleged use of the word "Safeway" by others and had strongly intimated that it was a word of common and general use [R. 129-145]. The court even suggested to counsel for the defendant that he check the telephone directories of 1925 to see if the word was not in use before the admitted appropriation of that word by Safeway in 1926 [R. 143].

During the court's discussion of his doubt as to plaintiff's right to appropriate "Safeway" at all, he said:

"I noticed the other day, Mr. Sterry, after I received this case and was looking at it, there was a

truck going up and down Spring Street, and on the side of it it said Prudential Cleaners. If any name has got a secondary meaning, it is Prudential Insurance Company. Does Prudential Insurance Company preclude anybody in an alien field from using that?" [R. 135.]

Hence, in our trial brief which we filed after the submission of the case we limited our discussion to the right of other retailers to use the name "Safeway". We did so largely because of the above quoted observations of the court and because the record without contradiction showed that the other users of "Safeway" were outside of the retail field. Defendants Exhibit "A" suggests one possible exception. We understand the concern is a very small and insignificant one.

We pointed out that the instant case did not involve a situation such as the court had commented on as to the word "Prudential" appearing on a truck.

While we believe that the plaintiff, as the original appropriator of "Safeway", has the exclusive right to the use of that word, we recognize there may be a difference between the right of a retailer and a non-retailer whose business or occupation cannot in any way be identified with plaintiff's retail sales, using "Safeway" in a corporate or fictitious name. Hence, without conceding the right of anyone else to use the word "Safeway", we took the position in our brief in the court below (largely because of the views the court had expressed as to the use of "Safeway" by non-retailers) that since this case presented the right of another retailer to include the word "Safeway" in the fictitious name under which he did business and to make "Safeway" the dominant word in his advertising, it was unnecessary to discuss the right of the plaintiff to prevent the use of "Safeway" by those not in the retail field, pointing out that the words "North American,"

of course, were words that no one could exclusively appropriate, but that this Court had held in *North American Aircoach Systems, Inc. v. North American Aviation, Inc.* (1955), 231 F. 2d 205, that because of the secondary meaning that had attached to those words in the aviation field the plaintiff could prevent anyone else in that field from using them. We further pointed out that it will be time enough to consider plaintiff's right to prevent someone who is clearly not a retailer, and whose business or services could in no wise be connected with the retail sale of merchandise, from using "Safeway" when a case arises presenting such a situation.

It is certain, however, that the mere fact that a number of other concerns have used the name "Safeway" does not constitute any defense of the defendant's use of it, much less of the defendant's attempt to use it as the sole name of his business in imitation of plaintiff's use of its trade name.

In this connection, we may say that we do not believe that a person in any field can, by the inclusion of "Safeway" in its corporate or fictitious name advertise its business under the name of "Safeway", or make "Safeway" the dominant word in all or any of its advertising.

Certain it is, however, that if other retailers are permitted to so use and advertise their merchandise as "Safeway", plaintiff's trade name will soon be of little, if any, value. Again, the observations of this Court in the *Stork* case, *supra*, 166 F. 2d 348, 357, are most appropriate:

"In *Cleo Syrup Corporation v. Coca-Cola Co.*, 8th Cir., 139 F. 2d 416, 417, 150 A. L. R. 1056, certiorari denied, 321 U. S. 781, 782, 64 S. Ct. 638, 88 L. Ed. 1074, the court declared that 'There is no merit in the contention that a court of equity will not afford protection to the plaintiff's trade-mark or prevent its good will from being nibbled away by unfair competitors.'"

Conclusion.

This is a clear case of a retail merchandiser attempting to trade under and upon the established trade name of another.

While the court found that Safeway was the trade name of the plaintiff with an established secondary meaning throughout the state as indicating only the plaintiff, it found that the plaintiff and the defendant were not in competition, notwithstanding that the court found both were selling furniture. The court based its conclusion that the parties were not in competition upon the fact that by far the larger portion of the plaintiff's merchandise at this time was food products, none of which were sold by the defendant.

The evidence showed that a number of persons during the past thirty years had filed in the County Clerk's office corporate or fictitious names containing "Safeway", but there was no evidence that any of those persons had actually used it or the business they had done, and the evidence without controversy showed that such use, if any, of the word had not affected the secondary meaning in Southern California of "Safeway" as indicating only the plaintiff. Notwithstanding, the court found that the plaintiff was entitled to the protection of its trade name only as to retailers vending articles usually found in grocery stores and food markets, and refused to permit the plaintiff to show what articles were now usually found in such stores.

It is apparent, of course, that assuming the defendant was not in competition with plaintiff,—as he was,—that if he can use the plaintiff's trade name and advertise his goods under it, that all other retailers not selling food can likewise use "Safeway" and advertise their merchandise under plaintiff's trade name. It is undeniable that such general use of plaintiff's trade name would

greatly deplete if not destroy the value of plaintiff's trade name, the present value of which is admitted to be 75 million dollars throughout the nation and approximately 20 to 25 million dollars in California.

To affirm the decree of the court would be to ignore entirely all of the rules as to unfair competition which have been laid down by the decisions of this and the courts of California and of all other jurisdictions, and to totally ignore the mandates of the statutes of California that a trade name is property, and the owner of it can prevent anyone else from using it.

We very respectfully, but with the utmost confidence, submit that the decree of the court below must be reversed with directions to enter an injunction as prayed for by the complaint against the defendant's use in his fictitious name of "Safeway."

All of which is

Respectfully submitted,

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No. 15294

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

SAFEWAY FURNITURE CO., INC., *et al*,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

FILED

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APPELLEE'S BRIEF.

Statement of the Case.

The appellee, Morris Rudner, who is the sole remaining defendant in this case, concedes that both the District Court and this Court have jurisdiction over the trial and review, respectively, and we, too, shall refer to the parties as plaintiffs and defendant.

Defendant has no quarrel with Plaintiff's recitation of what it calls "Uncontroverted Facts," except insofar as it attempts to insinuate that it is an "uncontroverted fact" that Safeway has acquired a secondary meaning indicating plaintiff *and the retail business conducted by it*. Plaintiff

had attempted to redraft finding of fact IV so that it would end with the clause "and the goods sold by it," [R. 71] but both defendant's counsel and the Court saw through this attempt and the Court found that the word Safeway had obtained a secondary meaning but only as indicating the stores operated by plaintiff, which to the defendant is a far cry from what plaintiff attempted to prove.

Defendant also disagrees with the conclusion plaintiff comes to in the second paragraph on page 8 of its Opening Brief, when it says "the script and block letters of the word Safeway used in defendant's advertising were the same as those used in plaintiff's advertising."

Points Involved.

To the defendant the problems involved in this matter are threefold:

1. Were the parties herein in competition with each other?

2. Did the defendant advertise in such a manner as to convey the impression that the defendant had any connection with the plaintiff, or were the customers or prospective customers of plaintiff or defendant confused or would there be any likelihood of the customers being confused because defendant used the name Safeway Furniture Co.?

3. Was the defendant guilty of using the name Safeway Furniture Co. in such a manner as to defraud the public?

ARGUMENT.

I.

The Parties Herein Are Not in Competition With Each Other.

The record is replete with evidence and findings that the defendant sold nothing but furniture and that, with the exception of a step-stool and a rocker (which does not resemble the rockers sold by plaintiff), neither party sold any of the items carried by the other. [R. 204, 205.] The items listed by Mr. Denney, plaintiff's manager, bears out the above statement. It is true the Court found [F. F. IV, R. 76] that in certain of its stores in a district other than Los Angeles, plaintiff has sold various items of household supplies, and itemizes these, but, it is also true, defendant never did, does not now, nor ever intends to sell the items listed therein, and therefore it is quite apparent the parties were not in competition. Not only is the merchandise not identical, but it is not even similar, for what the defendant sells is more commonly known as furniture, whereas what the plaintiff sells is more accurately described as household supplies or equipment, as set forth in plaintiff's complaint (Paragraph VII) and on page 4 of its Opening Brief. Plaintiff, throughout its Complaint, evidence, and Opening Brief, makes considerable of the fact it is big and has spent lots of money to establish this bigness and on page 27 of its Brief, awaits with great curoosity defendant's reply to its contention that surely it cannot be the law that a merchant who has established a good will value of \$75,000.000.00 for its

trade name cannot prevent another merchant from selling merchandise of the same classification.

To satisfy the curiosity of the plaintiff, defendant replies that the items sold by defendant and those heretofore sold by plaintiff, and even those plaintiff contemplates selling, are not of the same general character or classification. Surely, a household mop or wax is not in the same classification as a bedroom suite or living room suite. On page 27 of its Opening Brief, plaintiff complains that the decree entered by the Court must be reversed because it declined to allow the plaintiff to show items of household furniture as sold in retail grocery and food stores. Testimony, however, shows that it is not household furniture as such which plaintiff sold, but expendable supplies and equipment found in a household.

With respect to plaintiff's argument that the use by the defendant of the name Safeway Furniture Co. will dilute the value of the name Safeway, defendant respectfully draws to the attention of this Court the stipulation by the parties putting into evidence the many different Safeways which were filed with the Clerk of the County of Los Angeles, and which are to be found in the various telephone directories in this County.

II.

No Confusion Exists, nor Is There Any Likelihood of Confusion, Because of the Defendants' Use of the Name Safeway Furniture Co.

With respect to the defendant's advertisements, there was only one advertisement placed by defendant which could possibly have been confusing, which was on November 16, 1953, referred to in appellant's Opening Brief, page 49, wherein it says "Safeway is Open Sunday."

However, even plaintiff admits there is no other exhibit showing defendant used the word Safeway alone and the testimony of the defendant [R. 208] shows that the defendant has discontinued any such display advertising.

Defendant's Exhibit "A" is not an advertisement inserted by defendant, but by a Safeway Furniture Co. with which defendant had absolutely no connection whatsoever. [R. 207.]

In *Fairway Foods Inc. v. Fairway Markets Inc.*, (U. S. C. A. 9th Cir.), 227 F. 2d 227, the learned Circuit Judge writing the opinion of this Court said, "the evidence without conflict supports the trial court's finding that there has been no confusion or any likelihood of confusion because of the use of both parties of the word 'Fairway.' There is absolutely no competition between the parties. Perhaps the most important element of unfair trade is that there be competition in the sale of like merchandise and that there is, or there is likelihood of, confusion as to which competitive article is being purchased." Certainly our case falls foursquare within the *Fairway* case.

On page 34 of its Opening Brief, plaintiff cites the *Big Boy* case (9th Cir. 1955), 229 F. 2d 154, wherein this Court reversed the District Court's action in sustaining defendant's demurrer to the complaint. This Court reversed, as plaintiff's Opening Brief states, solely upon the ground that the allegation as to confusion of identity of manufacturer entitled the plaintiff to relief if he could prove his averment.

In the case at bar, the plaintiff tried to prove confusion but the evidence and findings clearly established there was no confusion.

III.

The Defendant Did Not Deceive or Defraud, nor Attempted to Deceive or Defraud the Public.

The evidence here shows no deception in or from the conduct of the defendant; no act or omission that was likely to deceive, no intent to deceive, no possibility of deception and no effort whatsoever to “palm off” defendant’s goods as that of the plaintiff’s.

In the case of the *Elgin Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 673, it was held that a secondary signification will be protected by restraining the use of the words by others in such a way as to amount to a fraud on the public. The essence of the wrong consists in the sale of goods by one manufacturer or vendor for those of another.

In the case at bar, the record conclusively proves that there was no fraud intended on the public; there was no attempt to “palm off” goods of the defendant as being goods of the plaintiff, nor do the advertisements of the defendant in any way tend to indicate that the defendant is connected in any manner whatsoever with the plaintiff.

In the case of the *U. S. Lift Slab Co. v. Allen H. Subbs*, Los Angeles Sup. Ct. No. 643308, the Superior Court of California held that since even a descriptive trade name may come to have a secondary meaning, it requires an accurate conception of what is denoted by the term “secondary” meaning. Judge Palmer, in his learned opinion, cites a number of leading cases with respect to the question of what is required after it is conceded a secondary meaning has attached to a phrase before the plaintiff in such cases is entitled to relief against subsequent users. Among the cases cited therein

is *Richmond Remedies Co. v. Dr. Miles Medical Co.*, 16 F. 2d 598, 602, wherein it is said:

“when a descriptive or geographical word or symbol comes by adoption to have a secondary meaning denoting origin, its use in this secondary sense may be restrained, *if it amounts to unfair competition*. In such a case, if the use of it by another be the purpose of palming off the goods of one as and for the goods of another, a court of equity will interfere for the purpose of preventing such a fraud.”

Conclusion.

Throughout its Opening Brief plaintiff cites a multitude of cases, very few of which have any bearing upon the issues of this case for the reasons that in the case at bar there was no competition between the parties, no confusion could exist in the minds of the public, that defendant practiced no fraud in connection with his use of the name Safeway Furniture Co., and there was no proof that the use of the term Safeway Furniture Co. depleted the value of plaintiff's name. In fact, the testimony of the plaintiff [R. 43] shows that its sales have increased despite the use by defendant of the name Safeway Furniture Co.

It is the contention of defendant that the testimony of the witnesses, stipulations of the parties, and the exhibits, sustain the findings of the Court below and justify its conclusions and that therefore the decree of said Court should be affirmed.

All of which is

Respectfully submitted,

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No. 15294.

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Appellees.

APPELLANT'S REPLY BRIEF.

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No. 15294.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

SAFEWAY FURNITURE CO., INC., *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

Except in the two particulars noted, defendant concedes plaintiff's statement of the uncontroverted facts.

He disagrees with the statement in our Brief that the script and block letters of the word Safeway in the defendant's advertisements are the same as the plaintiff's. That contention is best answered by an examination of the advertisements themselves.

Defendant's second exception to plaintiff's statement of uncontroverted facts is that it contains the assertion that the secondary meaning which the court found attached to the word "Safeway" indicated not only plaintiff and its chain of stores but "the retail business conducted by plaintiff," pointing out that the court only found Safeway's secondary meaning "as indicating the chain of stores operated by the plaintiff" [R. 71-77].

We cannot conceive, and defendant does not inform us, how a secondary meaning could indicate the stores operated by plaintiff without indicating the retail business conducted in such stores.

The most salient of the uncontroverted facts set out in our Brief* which defendant concedes to be true are:

“That in 1926, plaintiff’s predecessors adopted the arbitrary, coined and distinctive trade name ‘Safeway’ for use by them and their affiliated retail stores and in their various advertisements” (B. 5-6); that at least since December 31, 1942, “all stores operated in California by plaintiff were operated solely under the name of ‘Safeway,’ all stores’ signs and advertising being conducted under that name” (B. 6); *that the name had acquired a secondary meaning throughout California as indicating the chain of stores operated by plaintiff*; that defendant at all times knew of this secondary meaning, defendant testifying that prior to the suit he had not known any other name for plaintiff than “Safeway” (B. 6).

Defendant Advances Neither Reason nor Authority in Support of the Decree of the District Court.

In our Opening Brief, pages 22 to 25, we argued,—we believe quite conclusively—that the parties actually were in competition notwithstanding the great bulk of plaintiff’s sales was food. We pointed out that in addition to such merchandise, plaintiff in its Los Angeles Division had always sold certain items of household equipment and in many other Divisions for a long time had

*We will refer to our Opening Brief with the letter “B.” Also, as in our Opening Brief, all emphasis throughout will be ours unless otherwise noted.

been selling certain lines of household furniture, and intended to sell such articles in its Los Angeles Division. We contended that to hold that the parties were not in competition because at present the household furniture and equipment sold by plaintiff was not precisely the same as that sold by the defendant would unduly limit plaintiff's expansion of its business, and further, defendant could easily add to his lines the same articles of household furniture that plaintiff was selling and would undoubtedly do so if plaintiff built up a good will for them.

We further contended, pages 26 to 27, that in any event the Court was grievously in error in holding that the protection to be afforded plaintiff's trade name was limited to the sale of groceries and meats since it was well known that today most food markets sell many lines of non-food items, including furniture. The Court declined to allow us to prove that fact upon the ground that it was immaterial but in so holding the Court stated

"I know the tendency of most of the supermarkets *is to go in all lines of business*. In fact, there are even some who are selling clothing" [B. 26; R. 116].

On page 5 of his Brief, defendant says:

"In the case at bar, the plaintiff tried to prove confusion but the evidence and findings clearly established there was no confusion" (D. B. 5).

No Record citation is given, nor could one be.

Plaintiff made no effort to show any actual confusion, pointing out (B. 44) that under the circumstances of the instant case confusion at the customers' level would be almost impossible to show, citing well considered cases supporting that view. We did, however, attempt to in-

troduce expert testimony that the method of defendant's advertising would inevitably lead to confusion. The Court, however, refused to permit this evidence [B. 58-59, 95-97; R. 169-170].

The defendant, entirely ignoring the foregoing contentions of the plaintiff,—we believe because he could find no answer to them—places his principal defense of the decree appealed from upon his assertion: (1) That the parties were not in competition; (2) There was no showing of any actual confusion.

The defendant does not attempt to show that under the unbroken line of decisions of this Court and the California courts, cited on pages 32 to 48 of our Brief, neither competition nor a showing of direct confusion is necessary.

The only decisions defendant cites are: *Robert C. Wian Enterprises, Inc. v. Persinger* ("Big Boy" case), (9th Cir. 1955), 229 F. 2d 154, and *Fairway Foods v. Fairway Markets* ("Fairway" case), (9th Cir. 1955), 227 F. 2d 193.

It was upon these two cases that the court below decided that this Court, in disregard of its previous decisions and subsequent decisions to the contrary, and in disregard of the controlling settled law of California, held that it was necessary to show competition and confusion.

The two cases are considered in our brief, pages 34 to 38, where we showed that the only implication of the *Big Boy* case was that competition was not necessary; that in the *Fairway* case this Court was dealing with a case where the parties were in entirely different sections of the country, the plaintiff in the midwest and the de-

fendant in California, and the use of similar names by the parties had no impact upon either. Also, that in the *Fairway* case, this Court, by citing and quoting with approval from the *Yale* case, unmistakably indicated that its decision had no reference to cases where the parties were operating in the same territory.

Aside from the *Big Boy* and *Fairway* cases, defendant cites only three other cases, two of which are *Elgin National Watch Co. v. Illinois Watch Case Co.* (1901), 179 U. S. 665; 45 L. Ed. 365; and *Richmond Remedies Co. v. Dr. Miles Medical Co.* (8th Cir. 1926), 16 F. 2d 598. In the second case it was held, and in the *Elgin Watch* case stated by way of dicta, that in order to prevent one from palming off his goods as those of another, even a wholly descriptive trade name incapable of registration as a trade name would be protected if it had acquired a secondary meaning. By no stretch of the imagination can either decision be held to even intimate that a trade name, having acquired a secondary meaning,—especially a unique or coined one,—cannot be protected to prevent dilution or to prevent a newcomer from trading upon the value which has been given to it by its appropriator, even if he does not thereby dilute the value of the name or damage the first appropriator.

The only other citation is to an unreported opinion of the Superior Court of Los Angeles. An examination of the opinion in that case shows that an injunction was denied because the court found that the plaintiff's name was purely descriptive of the work which both parties were doing *and had not acquired a secondary meaning.*

(1) DEFENDANT'S ADVERTISEMENT.

On page 2 defendant states the second question involved is whether he advertised in such a manner as to convey the impression that the defendant had any connection with the plaintiff. However, he does not include that question in his argument. The suggestion is wholly erroneous.

Defendant does not contend that in all of his advertisements the word "Safeway" was not the *dominant word*; nor does he attempt to answer our argument that his obvious purpose in so advertising was to gain some advantage to himself from the enormous good will which plaintiff had given to its trade name. This in itself is a fraud upon both the plaintiff and the public even though the plaintiff suffers no monetary loss from it or the public is not led to believe that the defendant is connected with the plaintiff.

In *Hanover Star Milling Company v. Metcalf* (1916), 240 U. S. 403, 415; 60 L. Ed. 713, 719, upon which the decisions in the *Fairway* case of both this and the District Court were based, the Supreme Court said:

" . . . In the ordinary case of parties competing under the same mark in the same market, *it is correct to say that prior appropriation settles the question*. . . . but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant; unless, at least, it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, *such as to take the benefit of the reputation of his goods*, to forestall the extension of his trade, or the like."

Hanover Star Milling Company v. Metcalf, 240 U. S. 403, 415; 60 L. Ed. 713, 719.

(2) USE OF THE NAME "SAFEWAY" BY OTHERS.

The use by others of the name "Safeway" is fully considered in our Brief at pages 60 to 66 where we cited an unbroken line of decisions by this Court and those of other jurisdictions that a newcomer in a field cannot justify the use of another's trade name because others may also be trespassing on plaintiff's right by using it.

While the defendant now does not contend to the contrary, he suggests that there is no danger of diluting the value of plaintiff's trade name because of the fact that the evidence showed that during the last thirty-one years a number of other concerns had included the name "Safeway" in their names.

Defendant certainly can find no comfort from the fact that such use by others so far has not diluted the value of plaintiff's trade name. Defendant does not attempt to controvert our showing that the records of the County Clerk and telephone directories showed that those using "Safeway," with one or two possible exceptions of very minor establishment, were not retailers of merchandise, nor does defendant in any way challenge our contention that the evidence was uncontradicted, that no one other than the defendant has so far attempted to advertise its business under the name of "Safeway"; that if defendant is permitted to continue not only the use of but the advertising of his business under that name, any and all other retailers can do the same, with the certain result that the value of plaintiff's trade name will be greatly reduced if not destroyed.

Nor does defendant attempt to show that the decision of this Court in the *Stork* case (9th Cir. 1948), 166 F.

2d 348, 357, which we quoted on page 69 of our Brief, is not applicable:

“‘. . . There is no merit in the contention that a court of equity will not afford protection to the plaintiff’s trade-mark or *prevent its good will from being nibbled away by unfair competitors*.’”

- (3) THE FACT THAT PLAINTIFF SO FAR HAS NOT BEEN DAMAGED BY DEFENDANT’S USE OF THE NAME IS NO REASON FOR ALLOWING HIM AND OTHERS TO CONTINUE TO USE PLAINTIFF’S NAME.

In his conclusion defendant states:

“‘. . . there was no proof that the use of the term Safeway Furniture Co. depleted the value of plaintiff’s name. In fact, the testimony of the plaintiff [R. 43] shows that its sales have increased despite the use by defendant of the name Safeway Furniture Co.’” (D. B. 7.)

In the case of *Stork Restaurant, Inc. v. Sahati* (9th Cir. 1948), 166 F. 2d 348, 359, this Court said:

“The appellees stress the fact that the appellant has failed to show ‘that appellees’ operation in any way has injured appellant,’ etc.

“Neither under the California jurisprudence nor under the general law is such showing necessary. *The California decisions, indeed, are overwhelmingly in accord on this point.*”

Stork Restaurant, Inc. v. Sahati, 166 F. 2d 348, 359.

As shown in our quotation from the decision of the California Supreme Court in *Sun-Maid Raisin Growers of California v. Mosesian* (1927), 84 Cal. App. 485, 497-

498; 258 Pac. 630, 635, set out on page 47 of our Brief, the Court said:

“‘. . . The owner is not required to wait until the wrongful use of his trade-mark has been continued for such a length of time as to cause some *substantial pecuniary loss.*’”

*Sun-Maid Raisin Growers of California v. Mo-
sesian*, 84 Cal. App. 485, 497-498; 258 Pac.
630, 635.

Conclusion.

We respectfully submit that defendant's Brief suggests no reason for the affirmance of the decree appealed from unless this Court is willing to disregard and overrule all of its many decisions and to disregard the mandatory statutes of California and the uniform decisions of the courts of this State.

We further respectfully submit that to hold that where a retailer has appropriated a distinctive and coined name which has obtained a secondary meaning of immense value, to allow any and all other retailers not selling precisely the same line of merchandise to use precisely the same name or a confusingly similar one, would be to destroy the value of trade names.

All of which is

Respectfully submitted,

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